No. 90-1768

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

LEWIS STEPHEN WORK, et al.,

Petitioners,

vs.

TYSON FOODS, INC.; CITY OF GREEN FOREST, ARKANSAS; and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(A) Whether a citizen suit brought under 33 U.S.C. § 1365 can be precluded by the entry of a consent decree between the EPA and a polluter in an action initiated by the EPA after the citizens' suit was filed.

(B) Whether civil penalties assessed against Tyson and the City under the CWA were properly determined.

(a) Whether it is permissible under the Seventh Amendment for a trial court to "construe" an inherently ambiguous jury verdict in order to determine an issue of fact.

(b) Whether a trial court has absolute discretion in assessing penalties under the CWA, or is obliged to apply the criteria set forth in § 309 of the Act.

(C) Whether a circuit court can summarily and without explanation deny attorneys' fees and costs to citizen plaintiffs who have substantially prevailed in a citizens' suit brought pursuant to 33 U.S.C. § 1365.

PARTIES

Petitioners are Luke Anderson, Mary Anderson, John David Bailey, Jo Ann Bailey, Kim Suzette Bailey, Clay G. Battin, Graydon Bullock, Gwendolyn Bullock, Kenneth Cochran, Doris M. Cochran, Harold Carroll Collins, Mabel Maxine Collins, Patrick Henry Collins, David G. Combs, Harold Gene Combs, Glenna Ruth Combs, Arthur Harold Dillwith, Claris W. Dillwith, Joe Erwin, Wanda June Erwin, Russell Harold French, Barbara Lee French, Jerry D. Goen, Jane Marie Goen, Sara Beth Goen, Todd Lee Goen, David M. Granger, Shirley A. Granger, Jason Paul Granger, Edward K. Grisham, Sue Grisham, Roger Hurley Hall, Tommie Jean Hall, Michael Chad Hall, Aaron Brian Hall, Virgil Hammons, Clythy Hammons, Roy F. Hayhurst, Cecilia Hayhurst, Terry Hayhurst, Patricia Jean Hudson, Ashley Nicole Hudson, Justin David Hudson, Janice Ann Knight, Fred M. Massengale, Freddie Mae Massengale, Loman Maybee, Arlis Elbert McGehee, Patti Lynn McGehee, Justin Heath McGehee, Eric Shane McGehee, Brandon Cliff McGehee, Clifford Fornie McGehee, Georgia Maxine McGehee, Fred McGehee, Edith McGehee, Delta Peden, Ira Owen Peden, William Lee Pittenger, Tommie Jean Pittenger, John Arvil Proctor, Carolyn Proctor, Arthur Everett Ratzlaff, Ann Linda Ratzlaff, Marvin Claude Russell, Theta Shipman, Eugene Shipman, Henry L. Shudy, Betty R. Shudy, Allen Paul Slavens, Cybil R. Slavens, Roy Lee Smith, Velvia Joy Smith, Kenny L. Smothers, Blinda Faye Smothers, Kelly Larence Smothers, J.R. Snow, Farye Snow, Jae Lea Snow, Liz Snow, Ivan Swor, Beneva Blossom Swor, Eugene Underdown, Lois Underdown, Kyle Arthur Wallace,

PARTIES – Continued

Mary Ann Wallace, Clarence L. Wheaton, Carolyn Glen Wheaton, Charles E. Whitney, Viola C. Whitney, Danny Frank Wilson, Treva Ann Wilson, Justin Frank Wilson, Angela Michelle Langston, Danny Paul Wilson, Jay Frank Wilson, Rena M. Wilson, Joe Charles Wilson, Noah Fred Wilson, Lema Bea Wilson, Elizabeth Ann Wilson, Lewis Stephen Work, Margaret Work, John Work, Ralph Zizza and Frances B. Zizza, (hereafter "Work, et al.", "plaintiffs", or "petitioners"), who are citizens and residents of The State of Arkansas, residing in or near the City of Green Forest, Arkansas.

The respondents are Tyson Foods, Inc.; the City of Green Forest, Arkansas; and the United States Environmental Protection Agency.

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OPINIONS BELOW

The opinions and orders of the United States District Court in *Work, et al. v. Tyson Foods, Inc., et al.*, 720 F. Supp. 132 (W.D. Ark. 1989), which appear in Appendix at App. 44. The opinion of the United States Circuit Court of Appeals for the Eighth Circuit is reported in 921 F.2d 1394 (8th Cir. 1990), and appears in the Appendix at App. 1. Petition for rehearing and suggestion for rehearing en banc was denied, and the Eighth Circuit Court of Appeals' Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc appears in the Appendix at App. 81. The order of the United States Circuit Court of Appeals for the Eighth Circuit denying petitioners' attorneys' fees, costs and expenses appears in the Appendix at App. 43. The order of the United States Circuit Court of Appeals for the Eighth Circuit denying petitioners' motion for clarification and/or reconsideration of petitioners' claim for attorneys' fees, costs and expenses appears in the Appendix at App. 82.

JURISDICTION

The opinion of the United States Court of Appeals for the Eighth Circuit was entered on December 18, 1990 (Chief Judge Lay concurred in part and dissented in part). The judgment of the United States Court of Appeals for the Eighth Circuit was entered on December 18, 1990. Appendix at App. 41, *infra*. Petitioners' motion for attorneys' fees, costs and expenses was denied by Court's Order entered on February 25, 1991. Appendix at App. 43, *infra*. Petitioners' motion for clarification and/or reconsideration of that Order was denied by the Court's

Order entered March 27, 1991. Appendix at App. 82. Petitioners' timely petition for rehearing was denied by Order of the Court of Appeals entered on February 14, 1991. Appendix at App. 81, *infra*. This Petition is filed within 90 days of said Order. This Court's jurisdiction is involved under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

33 U.S.C. § 1319 (*see*, Appendix at App. 95).

33 U.S.C. § 1342 (*see*, Appendix at App. 114).

33 U.S.C. § 1365 (*see*, Appendix at App. 134).

Seventh Amendment to the Constitution of the United States (*see*, Appendix at App. 138).

STATEMENT OF THE CASE

Lewis Work, et al., petitioners, reside east of the small town of Green Forest, in the Ozark Mountains of northwest Arkansas. This case arises from pollution discharged from a wastewater treatment plant ("POTW") owned by respondent City of Green Forest ("City"), into a stream known as Dry Creek that flows through the area where petitioners reside.[1] The principal source of pollution is organic waste discharged from a chicken processing plant owned and operated by respondent, Tyson Foods, Inc. ("Tyson").

[1] The geology of the area is karst topography, which means that the principle structures are limestone. Limestone is water soluble and thus quite porous. In such areas, groundwater aquifers are in close contact with surface water. Dry Creek is a "losing stream", which means that much of its flow goes into underground aquifers.

The history of pollution in Dry Creek from the City's POTW dates back into the late 1960's. Tyson was then and is now the only major industrial contributor to the City's POTW. In the early 1970's, due to deteriorating conditions in Dry Creek, evidence of possible adverse impact on the groundwater supplies in the area, and resulting complaints of citizens east of the City, the City applied for and received a federal grant through the EPA to build a new POTW. Pursuant to the grant application process, the EPA approved the plans and specifications for the new POTW and set certain conditions, among which were that the City prohibit discharges from Tyson's chicken processing plant in excess of 400 milligrams per liter ("mg/L") of biochemical oxygen demanding waste ("BOD"), and 302 mg/L total suspended solids ("TSS"), and a maximum daily BOD loading of 3,730 lbs. (Appendix at App. 83). Waste which exceeded these parameters would overload the design capacity of the City's POTW and prohibit it from achieving its designed level of treatment. To meet these parameters, it was necessary for Tyson to "pre-treat" its waste before discharging it to the City's POTW.

In May 1973, the City requested a National Pollution Discharge Elimination System ("NPDES") permit, as required by the Clean Water Act ("CWA" or "the Act"), 33 U.S.C. § 1342, indicating in its application that the POTW should be capable of meeting secondary treatment standards.[2] The permit was issued in 1974. The City,

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[2] "Secondary Treatment Standards" were defined by the EPA as 30 milligrams per liter for 30 day average BOD, or 85% TSS removal. See, 40 C.F.R. § 133.102.

however, never modified its ordinances to prohibit discharges from Tyson in excess of the limits referenced above, and Tyson did not pretreat its waste or otherwise produce an effluent meeting the established criteria. It is unclear from the records whether the new POTW ever achieved Secondary Treatment Standards, but the quality of its discharge and the condition of Dry Creek greatly improved.

With the construction of the new plant, a suit against Tyson's then-subsidiary, Franz Foods, being prosecuted by citizens residing east of the City, was settled. In the settlement Tyson agreed not to discharge waste into the City's POTW so as to alter the conditions of Dry Creek or which would constitute a violation of any City ordinance, state or federal law.

As time passed Tyson expanded its operations, and the quality of wastewater discharged by the City's POTW deteriorated. Over the next decade there were periodic inspections, correspondence, and warnings issued by the EPA and Arkansas Department of Pollution Control & Ecology ("ADPC&E"). By the early 1980's the City's POTW was discharging waste stronger than domestic raw sewage. The agencies specifically stated to the City on several occasions that these conditions were related to the failure of the City to require Tyson to pretreat its waste. One EPA inspector observed that the City's failure to require Tyson's pretreatment was due to the political and economic duress imposed upon the City by Tyson. Appendix at App. 86, 88 and 90.

Despite this, no enforcement action was taken against the City or Tyson by any agency, other than the periodic issuance of administrative orders ("AO's"), which only served to grant the City higher and higher interim limits.

A City employee testified at trial that by 1983/1984 the City was 'doctoring' POTW samples, taking them on the weekends when Tyson was shut down, and pumping sludge around the final clarifiers, directly into Dry Creek. In an effort to keep the POTW from going septic, the City skimmed sludge off the clarifiers and hauled it in tank trucks for land-application which, in itself, represented a risk to area groundwater aquifers.

Tyson loaned the City trucks for the sludge-hauling and land-application. At trial, Tyson's environmental engineer testified he was aware of pretreatment technologies suitable for this plant, and was aware of the CWA prohibitions against interference and pass-through. He also testified that, in the spring of 1984, he had calculated the loading Tyson was placing on the City's POTW. Earlier correspondence demonstrated awareness by Tyson of the City's inability to meet its permit levels.

In August 1984, after a sinkhole opened in Dry Creek downstream from the POTW, the Health Department determined that residential waterwells in the Dry Creek basin were being adversely impacted by the POTW's discharge. Subsequently, the Health Department established an Imminent Health Threat Zone in the area east of the City, and a Proclamation was issued by the Governor on October 18, 1984 declaring it a Disaster Area. The EPA sent Mr. Reeves, one of its chief engineers, to inspect the City's operation. He found that the City's POTW was grossly overloaded by Tyson's waste.

In November 1984, ADPC&E notified the City that it appeared from a recent diagnostic evaluation (Mr. Reeves' study) that "a high strength biological waste discharged by Tyson" was "interfering with the ability of the POTW to meet its permitted effluent limits." He

directed the City to implement a pretreatment program with Tyson that would insure the cessation of the interference.

On February 5, 1985, EPA's Director of Wastewater Management Div., Region VI, wrote the City indicating the EPA was concerned about water quality problems in the Green Forest area that were apparently due to the continued overloading of the City's POTW by Tyson. He pointed out to the City its obligation under its NPDES permit to control Tyson's effluent, and since the POTW's problems were apparently the result of failure on the part of the City to do so, EPA had determined that the City's interim limits were inappropriate and that the City would be placed on their final limits, as contained in the permit then in effect.[3]

All the facts recited in these two letters from the EPA and ADPC&E to the City had been true since 1974.

In June 1985, Tyson completed a pretreatment facility as required in an administrative order entered into between the City and the ADPC&E. The City's POTW effluent improved dramatically, exceeding secondary treatment standards. However, Tyson continued to be the principal load on the City's POTW which, in turn, continued to violate its permit limits. These violations notwithstanding, Tyson announced plans to expand its Green Forest facilities and production capacity.

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[3] By this time "final limits" had been set for the City's POTW which were more stringent than Secondary Standards. Those limits were established based on water quality requirements mandated by the CWA.

In November 1985, EPA issued a new AO to the City that set a specific construction schedule for the completion of a new tertiary treatment facility.

In January 1986, the Health Department notified the City of a second expansion of the Imminent Health Threat Zone, which then encompassed an area of 15.7 square miles.

On June 15, 1986 the POTW "went septic," resulting in a large quantity of poorly treated waste being discharged into Dry Creek and causing a large fish kill downstream. This septic condition at the POTW and resultant fish kill coincided with a shutdown of Tyson's pretreatment facility, and the City's wastewater superintendent initially concluded that the condition was a result of Tyson's operation, as did the local ADPC&E inspector. An ADPC&E engineer concluded to the contrary.

Also in 1986, Tyson expanded its operation by fifty percent. The City continued to violate its NPDES permit, and failed to meet several deadlines in its construction schedule. At this time Tyson was also land-applying sludge – a semi-liquid waste from its pretreatment facility – in the area of the Imminent Health Threat Zone, and in the proximity of Anderson Springs, the source of the City's drinking water supplies. Anderson Springs itself had, by that time, become a water supply for some of the petitioners who, under a remedial action program, were being extended city water lines.

On November 10, 1986, petitioners sent notice to all parties, as required by 33 U.S.C. § 1365(a)(1)(A), of their intent to sue Tyson and the City under the CWA.

On November 28, 1986 EPA issued another AO to the City reflecting its non-compliance with deadlines previously established for receiving bids and commencing construction on the new tertiary treatment plant; noting the City's continued violation of its existing permit limits; and requiring the City to show cause why EPA should not take further enforcement action.

In 1987, Tyson's production capacity reached 840,000 lbs. of chicken per day at the Green Forest plant, and had plans for further expansion.

Petitioners filed suit against the City and Tyson on March 3, 1987, invoking the District Court's jurisdiction under 33 U.S.C. § 1365 and 28 U.S.C. § 1331.

On August 10, 1987 EPA cited the City in an AO for several operational permit violations, including improper sludge disposal which was permitting its entry into the waters of the United States. On September 28, 1987, EPA filed its own suit against the City pursuant to 33 U.S.C. § 1319. On November 25, 1987, petitioners moved to intervene in *or* consolidate the EPA suit with their original action; that motion was denied. In March 1988 the Arkansas Health Department again expanded the area of the Imminent Health Threat Zone east of the City of Green Forest.

Subsequent to the filing of petitioners' suit, Tyson voluntarily ceased land application of sludge from its pretreatment plant in the Green Forest area. The City's plant construction got on schedule and was completed in June 1988, after which no further permit violations occurred.

Just prior to trial of this action, the City and EPA sought approval of a consent decree in the EPA case. In light of the proposed consent decree, the petitioners

again sought to consolidate and/or an opportunity to intervene to oppose the settlement. On March 24, 1989 these motions were also denied, and the trial court, without conducting a hearing on the adequacy of the consent decree, approved settlement of the EPA action on March 29, 1989, in which the City paid a fine of $15,000.

The trial of this action began April 4, 1989. On April 12, 1989 the trial court entered summary judgment against petitioners on their CWA complaint against the City, holding the City's settlement with EPA was *res judicata* as to their claim. During the final days of the trial, in May 1989, the POTW was again upset and Dry Creek was polluted. The jury returned a verdict on May 12, 1989, against Tyson on petitioners' common law claims, and found Tyson guilty of forty-three (43) violations of the CWA.

On April 18, 1989, petitioners filed a Notice of Appeal from the order denying them intervention in the EPA action.

On June 16, 1989, petitioners moved for assessment of CWA penalties against Tyson and for injunctive relief. On June 29, 1989 Tyson moved for judgment NOV. On August 24, 1989 the trial court denied Tyson's motion for judgment NOV and entered judgment for civil penalties of $43,000 against Tyson under the CWA. On September 7, 1989 Tyson moved for reconsideration of its request for judgment NOV and/or for a new trial; those motions were denied November 28, 1989. Petitioners filed their Notice of Appeal on September 25, 1989. Tyson appealed on October 10, 1989.

On December 28, 1989 Tyson appealed from the trial court's denial of its motion to reconsider, and petitioners

filed a cross-appeal on January 3, 1990. On appeal, petitioners' case against the City and Tyson was consolidated with petitioners' appeal of the trial court's failure to allow intervention of the EPA action against the City.

The Eighth Circuit, in its opinion, reversed the trial court on a number of issues related to the petitioners' common law claims against respondents, including the failure of the trial court to grant petitioners a punitive damage instruction, the exclusion by the trial court of a substantial portion of the potential evidence related to the history of the situation, and a number of directed verdicts granted by the trial court concerning some of the petitioners' common law claims. The appellate court also ruled that the damage instruction as related to petitioners' property was erroneous and reversed that aspect of the case against both defendants.

The court agreed with petitioners that the trial court erred in failing to instruct the jury that a violation of a 30-day average permit requirement was equivalent to thirty (30) separate daily violations, but concluded it was harmless error. Judge Lay dissented on this issue. The court also rejected petitioners' argument that the amount of fines levied by the trial court against the City and Tyson were inconsistent with the statute and the evidence. The court agreed with petitioners that the trial court should have granted petitioners right of intervention in the EPA action but held that petitioners' objections to the consent decree were considered by the trial judge and hence the error was harmless. The court concluded that the consent decree entered in the EPA action was *res judicata* as to petitioners' claim against the City, even though that claim was properly filed prior to the EPA's action under the CWA's citizen suit provision, but ordered a remand with

regard to the CWA action as related to the City in order for the trial court to determine petitioners' attorneys' fees under the CWA.

The court rejected all of Tyson's arguments on appeal concerning the CWA. These included an argument by Tyson that petitioners lacked a good faith basis for alleging future violations of the Act; that petitioners' claim was mooted or was otherwise precluded by virtue of the failure of the EPA to bring an action against Tyson, which Tyson attempted to equate with a determination that it was not guilty of pass-through or interference; that settlement between the EPA and the City had mooted or was otherwise *res judicata* to the petitioners' claim against Tyson; that the administrative order entered into between the City and ADPC&E, in which the City agreed to require pretreatment on the part of Tyson, constituted prior enforcement; that Tyson's compliance with discharge limits set forth in the aforementioned state administrative order entitled it to assert a "local limit" defense; and, finally, that the terms "pass-through" and "interference", as used in the Act, were inadequately defined and, hence, prohibitively arbitrary to be enforced.

REASONS TO GRANT THE WRIT

1.

WHETHER A CITIZEN SUIT BROUGHT UNDER 33 U.S.C. § 1365 CAN BE PRECLUDED BY THE ENTRY OF A CONSENT DECREE BETWEEN THE EPA AND A POLLUTER IN AN ACTION INITIATED BY THE EPA *AFTER* THE CITIZENS' SUIT WAS FILED.

Petitioners contend that the settlement of an enforcement action by the EPA under the CWA, subsequent to

the proper initiation of a citizens' suit under 33 U.S.C. § 1365 of the CWA, does not have a *res judicata* effect on the citizens' suit action.

This issue has not been previously addressed by this Court. It has been addressed by at least one other circuit and other district courts, all of which have found contrary to the appeals court below.

The appellate court erroneously concluded that the entry of a consent decree in an enforcement action commenced subsequent to the filing of a citizens' suit pursuant to 505(a) of the CWA [33 U.S.C. § 1365(a)] precluded the prosecution of a previously filed citizens' suit. Section 505(a) provides that:

> . . . any citizen may commence a civil action on his own behalf –
>
> > (1) against any person . . . who is alleged to be in violation of (a) an effluent standard or limitation under this chapter . . .

This right is only limited by subparagraph (b), which provides:

> (b) No action may be commenced –
>
> > (1) under subsection (a)(1) of this section –
> >
> > > (A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or
> > >
> > > (B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States

> any citizen may intervene as a matter of right.

This Court has recognized that Congress intended for the EPA to have the primary role in enforcing the Act. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987). It is clear, however, that Congress intended for EPA to either exercise its role as primary enforcer or yield to the citizen's enforcement mechanism. This is borne out by the plain language of the statute, its legislative history, and relevant case law.

The Act requires that prior notice be afforded the EPA before a suit can be initiated by the citizen. The reason for requiring such notice is set forth in the legislative history.

> In order to further encourage and provide for agency enforcement, the Committee has added a requirement that prior to filing a petition with the court, a citizen or group of citizens would first have to serve notice of intent to file such action on the Federal and State water pollution control agency and the alleged polluter.
>
> * * *
>
> The Committee has provided a period of time after notice before a citizen may file an action against an alleged violator. The time between notice and filing of the action should give the administrative enforcement office an opportunity to act on the alleged violation.
>
> It should be emphasized that if the agency had not initiated abatement proceedings following notice or if the citizen believed efforts initiated by the agency to be inadequate, the citizen might choose to file the action.
>
> * * *

> It is the Committee's intent that enforcement of these control provisions be immediate, that citizens should be unconstrained to bring these actions, and that the courts should not hesitate to consider them.

U.S. Code Cong. and Ad. News pp. 3745-3746.

The statute prohibits the commencement of an action if the appropriate governmental agency is diligently enforcing the Act. However, in the absence of governmental enforcement, the citizen's role becomes central. Had Congress not intended this result it could have easily stated, "No action may be commenced *or maintained* . . . if the Administrator has commenced and is diligently prosecuting" an action. Congress chose not to include this limiting language in the original bill, nor has it adopted such language in any of its subsequent CWA amendments.

The appellate court's decision effectively creates a new limitation on a citizen's right to maintain an action – a limitation which Congress chose not to include. Under this holding, citizen suits would be prohibited from proceeding when the Administrator *subsequently* commences and settles an enforcement action. Thus, EPA's failure to take action upon receiving the citizens' sixty-day notice of intent to file suit, an event which Congress clearly intended to either encourage agency action or trigger the citizen's right to commence and prosecute an enforcement action, no longer guarantees the citizen that his suit will be prosecuted to finality.

Other language in the Act suggests that the Eighth Circuit's holding is contrary to Congress' intent. Section 505(c) [added with the 1987 CWA amendments (P.L. 100-4)] allows the EPA the right of intervention in a

citizen suit. 33 U.S.C. § 1365(c)(2). This demonstrates that once the jurisdictional requirements of 505(b) are met, Congress contemplated that the government's role would become secondary to that of the citizen. Had Congress intended otherwise, then this provision would be superfluous. EPA would have no need for a right of intervention had Congress intended for it to file a separate action, independent of the citizen's action, and exercise what amounts to a veto power over a properly initiated citizen's suit.

The 1987 amendments also provided for EPA to review and comment on proposed consent decrees between a citizen-plaintiff and the polluter. 33 U.S.C. § 1365(c)(3). Again, this contemplates EPA playing a secondary role once it declines to initiate its own enforcement action in response to the citizen's notice.

Congress clearly intended to give EPA the first right to enforce. Thus, the sixty-day notice requirement was included. If EPA takes appropriate action upon receiving its notice, then citizens may only intervene. If the EPA fails to enforce and the citizens file their action, then EPA is allowed to intervene in the citizen's action and to comment upon any consent decree between the citizen and the violator. The effect of the decision below is to alter this scheme in that a citizen may not prosecute his action to a conclusion if the EPA belatedly acts.

Both *Sierra Club v. Simkins Indus., Inc.*, 617 F. Supp. 1120 (D.C. Md. 1985), and *Connecticut Fund for the Environment v. Job Plating Co., Inc.*, 623 F. Supp. 207 (D. Conn. 1985), addressed the argument that a subsequent state administrative enforcement action is diligent prosecution for purposes of § 1365(a)(1)(B). Both courts held that only

prior enforcement action constitutes 'diligent prosecution' that would preclude the filing of the citizen suit.

In *Atlantic States Legal Found., Inc. v. Koch Refining Co.*, 681 F. Supp. 609 (D. Minn. 1988), the court, in dealing with a motion to dismiss based on a subsequently filed EPA enforcement action, found the plain language of § 1365 to be conclusive. It also found that, "[e]very court which has considered the issue has concluded that section 1365 precludes dismissal of a properly filed citizen suit as a result of subsequent governmental enforcement action." (citations omitted). *Id.*, at 613.

In *Sierra Club v. Coca-Cola Corp.*, 673 F. Supp. 1555 (M.D. Fl. 1987) the citizens' group filed suit and shortly thereafter the EPA instituted its enforcement action. The cases were consolidated on the citizens' group's motion (as petitioners herein requested), and the EPA and the violator sought to resolve the action through the entry of a consent decree, which the citizens' group opposed. While noting that Congress intended for the EPA to be the primary enforcer of the Act, the court recognized that this could not change the rule that a consent decree could not affect the rights of a non-consenting party. [*See, United States v. City of Miami*, 664 F.2d 435 (5th Cir. 1981)]. Thus, the citizens' action was allowed to survive the entry of the consent decree.

Finally, in *Chesapeake Bay Found., Inc. v. American Recovery Co., Inc.*, 769 F.2d 207 (4th Cir. 1985) the Fourth Circuit held that a subsequently filed government action did not bar the citizen's action. The appeal was held to be moot, but only because a proposed consent decree between the government and the polluter was sanctioned by the plaintiff, who characterized it as a "'good' settlement to which it had no objections." 769 F.2d at p. 209.

Absent the citizen's express approval of the proposed consent decree, the previously filed suit would have been allowed to continue notwithstanding the consent decree. In short, *there is no authority under any case that has dealt with this issue for the holding below.*

Here, a consent decree to which the citizens *objected* was allowed to have a preclusive effect on their previously initiated action, without affording them a hearing in which to present their position and arguments.[4] The citizens prosecuted their case against the City for more than two years, and produced evidence of over a thousand CWA violations, upon which they had previously moved for summary judgment. The EPA took no action to enforce the Act for almost *fifteen* years, and only filed suit after the plaintiffs were properly in court.

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[4] After denying petitioners an opportunity to intervene in the EPA action, and entering the consent decree without affording a hearing, the trial judge gave the decree *res judicata* effect on the petitioners' CWA action against the City. The Eighth Circuit agreed it was error not to permit the intervention, but held the error harmless on the grounds that the trial court had considered petitioners' position in rejecting their intervention. The petitioners contend that the opportunity to file objections is not equivalent to a hearing on the merits. This is particularly true where the trial court clearly was acting under the misimpression that petitioners were not appropriate parties to the proceeding, and that he "lacked subject matter jurisdiction to hear petitioner objections" (Appendix at App. 76).

While petitioners contend that the appellate court erred in holding the district court's failure to allow intervention harmless, this error is overshadowed by the greater error herein addressed. Obviously, had the trial court not given *res judicata* effect to the consent decree, any error in failing to permit intervention would in fact have been harmless.

To allow a consent decree which provided for a mere $15,000 in civil penalties to terminate petitioners' action undermines Congress' intent behind allowing citizens to enforce the Act. If this decision stands on review, this critical aspect of the CWA will remain in conflict, and the viability of the citizen suit as an enforcement tool under the Act will be in question.

2.

WHETHER CIVIL PENALTIES ASSESSED AGAINST TYSON AND THE CITY UNDER THE CWA WERE PROPERLY DETERMINED.

(a) WHETHER IT IS PERMISSIBLE UNDER THE SEVENTH AMENDMENT FOR A TRIAL COURT TO "CONSTRUE" AN INHERENTLY AMBIGUOUS JURY VERDICT IN ORDER TO DETERMINE AN ISSUE OF FACT.

The issue of whether the CWA has been violated and, if so, how many violations there have been, is a jury question. *Tull v. United States,* 481 U.S. 412 (1987). In this case the Court of Appeals has in effect sanctioned the trial court's determination of this issue by permitting him to "construe" an ambiguous jury verdict.

Due to the overwhelming scope and duration of the CWA violations involved in this case, petitioners at trial focused on the principal permit criteria, i.e., monthly average violations of BOD and TSS.[5] Under the CWA, an indirect discharger – such as Tyson in this case – can be guilty of pass-through or interference only if the permit

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[5] There were also violations of document keeping, laboratory testing procedures, failure to provide various forms of information to the regulatory agencies, etc. There were additional violations, such as seven-day average violations.

holder (the City) is in violation of its permit as a result of such interference or pass-through. The foundational record of the number of violations is the Discharge Monitoring Reports ("DMR's"), filed monthly with the regulatory agencies. These reports set forth violations only in terms of 30-day and 7-day averages.[6]

A violation of a 30-day average amounts to 30 separate daily violations for the purposes of the Act. *Atlantic States Legal Found., Inc. ("ASLF") v. Tyson Foods, Inc.*, 897 F.2d 1128, 1139 (11th Cir. 1990); *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield Ltd., Inc.*, 791 F.2d 304, 314 (4th Cir. 1986). In view of the nature of the evidence before the jury, the petitioners sought an instruction from the trial court explaining to the jury that a 30-day average violation should be considered as 30 separate daily violations. The trial court declined this instruction. The majority opinion below agreed this was erroneous, but held that the jury could have discerned the number of daily violations on their own. However, the trial court did not instruct the jury to determine the number of *daily* violations, but simply instructed the jury to determine the *number* of violations. Clearly, without independent knowledge that the issue was the number of "daily" violations, the jury could not know that a single 30-day average violation constitutes 30 separate violations.

As a result of this error, the trial court had to "construe" the decision of the jury to mean "violations on 43 separate days", 720 F. Supp. 133, 138, Appendix at App. 44, 58. This, in spite of the fact that a clear reading of the

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[6] Contrary to the assertions of the majority opinion below, there was *no* documentation presented to the jury which reflected the number of permit violations on a daily basis.

DMR's reflects that the number of actual violations falling within the statute of limitations would be somewhere in excess of 1,200.

As Chief Judge Lay stated in his dissenting opinion:

> The district court refused to give plaintiffs' proposed instruction that would have explained to the jury that each monthly average violation must be construed as 30 individual daily violations. The majority concedes that the court erred in refusing to give this instruction, which is firmly rooted in the text of the Act. The jury found 43 violations, an erroneous figure that does not correspond to any view of the evidence. The district court admitted the verdict was ambiguous when the [trial] judge stated he had to "construe" the verdict to mean there were violations on 43 separate days.
>
> No doubt the faulty instruction confused the jury. There is nothing in the record that makes me confident that they determined the correct number of violations. Perhaps too eager to avoid relitigation of this case, the majority simply declares the error harmless and attempts no analysis or explanation for its decision. The majority goes on to affirm the [trial] judge's penalty calculations, relying on the fact that the calculations are discretionary. The [trial] judge's discretion to set the amount of the penalty, however, *does not carry over into the jury's province to determine the number of violations.* (emphasis added)

921 F.2d 1394, 1412; Appendix at App. 39, 40.

The Eighth Circuit's majority opinion in allowing the trial judge to "construe" such an ambiguous finding was, in effect, allowing the trial judge to determine the number of violations. Indeed, in their opinion, Appendix at App. 28, in discussing the trial court's construction of the jury's verdict, the majority opinion states:

> The [trial] court stated that it had heard and had the benefit of the entire record in the case. *Id.*, at 137. The opinion indicates, moreover, that the [trial] court considered the law applicable to the assessment of penalties. For example, in the section addressing *Gwaltney*, the [trial] court referred to the Fourth Circuit's holding that each violation of monthly averages for discharge of pollutants amounts to a violation for each day of the month. *Id.*, at 135.

921 F.2d 1407.

The Eighth Circuit, in its opinion, goes on to state that the majority would have been more comfortable with the jury instructions had they clearly articulated the rule with respect to the monthly average permit violations.

It is not sufficient that the trial judge heard the evidence, or that *he* understood the necessary law. It is the *jury* which must be properly instructed on the law such that it can reasonably be assumed they applied it. As the case currently stands, all one can say is that a jury participated in the fact-finding process. However, it is clear on both courts' records that the jury did not make the findings – the trial court did.

A truly harmless error in instructing a jury would not require the trial court to "construe" the verdict, or leave the appellate court uncomfortable and relying upon the trial judge's interpretation of the facts based on his knowledge of the record. Stating this issue differently, the question is to what extent a trial court can call upon its own knowledge of a case and controlling law to cure a defect in the instruction to the jury and not violate the Seventh Amendment to the Constitution. Petitioners assert this is a significant issue worthy of this Court's consideration.

(b) WHETHER A TRIAL COURT HAS ABSOLUTE DISCRETION IN ASSESSING PENALTIES UNDER THE CWA, OR IS OBLIGED TO APPLY THE CRITERIA SET FORTH IN § 309 OF THE ACT.

The consent decree between EPA and the City provided for the City to pay civil penalties of $15,000. The district court assessed civil penalties against Tyson of $43,000. Both amounts were affirmed on appeal. This represents 10% of the total penalties which could have been assessed against Tyson, based on the trial court's construction of the jury's verdict as meaning 43 daily violations, and an infinitesimal percentage of the City's potential liability, based on the number of undisputed violations appearing on the face of the DMR's.[7]

This Court, in *Tull v. United States*, 481 U.S. 412 (1987), made clear that economic gain and restoration of the status quo is not the only basis on which penalties should be awarded under the CWA. The EPA penalty policy is an important guide, as recognized by this Court in *Tull*. Petitioners submitted this Penalty Policy and requested that the district court follow its guidance, as set forth in *Tull*.

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[7] If the jury actually determined 43 monthly violations by Tyson this would equal 1,290 separate daily violations, and Tyson's maximum penalty would have been $12.9 million. The 1987 CWA amendments [P.L. 100-4, at 33 U.S.C. § 1319(d)] provide additional guidance to determine civil penalties, saying the court should consider the seriousness of the violation(s), the economic benefit (if any) resulting from the violation(s), any history of such violation, any good-faith efforts to comply with applicable requirements, economic impact of the penalty on the violator, and such other matters as justice may require.

The Eleventh Circuit, applying *Tull*, set forth the following procedure for assessing civil penalties:

> Upon remand, the district court should first determine the maximum fine for which Tyson may be held liable. If it chooses not to impose the maximum, it must reduce the fine in accordance with the factors spelled out in § 1319(d); clearly indicating the weight it gives to each of the factors in the statute and the factual findings that support its conclusions. While the court may find the EPA's Penalty Policy helpful in determining the appropriate fines, the court's primary focus should be on the language of § 1319(d).

ASLF v. Tyson Foods, Inc., 897 F.2d at 1142.

In affirming the trial court's penalty assessment in this case, the Eighth Circuit has ignored the direction of the *Tull* decision and, in effect, granted the district court near absolute discretion in assessing penalties. Indeed, in regard to the penalties assessed against the City, the record reflects that the trial court did not perform a penalty analysis at all, since it was operating under the erroneous impression that the petitioners had no standing in the proceedings, that the court lacked subject matter jurisdiction to consider the proposed consent decree reached in the EPA's action against the City, and that this decree was *res judicata* on the petitioners' citizens' suit. Such facts as the City collecting an average of $10,520 per month from Tyson at certain times was not considered.

With regard to Tyson, few if any of the factors set out in § 1319(d) were considered. Testimony of Tyson's own employee revealed that Tyson saved approximately $1 million per year by not complying with its obligations under the Act, and their violations dated back to the date the Act was passed. Tyson declined to comply with its

obligations under the Act until the Governor declared a disaster area. The violations resulted in the contamination of a 56-square-mile area of groundwater. The net worth of Tyson and its ability to pay the fine was certainly never considered. There was, in fact, absolutely *no* justification recited in the trial court's opinion for assessing less than the maximum penalty allowed for the 43 violations that the trial court "construed" from the jury's verdict.

In affirming the trial court's assessment of penalties, the Eighth Circuit has clearly departed from the holdings of *Tull*, 481 U.S. 412, and the Eleventh Circuit's recent decision in *ASLF v. Tyson Foods, Inc.*, 897 F.2d 1128.

3.

WHETHER AN APPELLATE COURT CAN SUMMARILY AND WITHOUT EXPLANATION DENY ATTORNEYS' FEES AND COSTS TO CITIZEN PLAINTIFFS WHO HAVE SUBSTANTIALLY PREVAILED IN A CITIZENS' SUIT ACTION BROUGHT PURSUANT TO 33 U.S.C. § 1365.

After the petitioners brought their citizens' suit action in this case, Tyson ceased land-applying sludge in the Green Forest area, thereby abating a continuing risk to the groundwater and surface waters in the Imminent Health Threat Zone where the petitioners resided. Construction of the City's new POTW was finally completed and it became operational. In spite of numerous errors committed by the trial court, the petitioners succeeded in principle on their common law actions against Tyson, which were associated with its unlawful conduct, and established that Tyson was guilty of violating the CWA

and, presumably, encouraged the EPA to take at least some action against the City under that Act.

On appeal, petitioners successfully resisted numerous legal assaults by which Tyson sought to escape legal responsibility under the CWA, and established their right of intervention in the EPA action and thus their right to have attorneys' fees and costs assessed with regard to their efforts under the Act, associated with the City's violations. As such, at the conclusion of the appeal in this case, the petitioners clearly stood in the position of a "prevailing party", as that term has been defined in connection with statutorily established attorneys' fee claims.

Specifically, it has been held that a party need not prevail upon all issues or an entire claim in order to be entitled to attorneys' fees. *Texas State Teachers v. Garland Indep. School Dist.*, 489 U.S. 782 (1989). Rather, if the petitioners prevail on any significant issue in this litigation which achieves some of the benefits the parties sought in bringing the action, they have prevailed sufficiently to be entitled to a fee assessment. *Hensley, infra.* It has also been held that a party prevailing upon causes of action closely associated with those for which attorneys' fees awards are statutorily established can be deemed to have prevailed. *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Maher v. Gagne*, 448 U.S. 122, 132 n.15 (1980); *Oldham v. Ehrlich*, 617 F.2d 163 (8th Cir. 1980). Further, conduct on the part of a defendant brought about by litigation can satisfy the prevailing party requirement so as to justify the award of statutory attorneys' fees. *United Handicap Fed'n v. Andre*, 622 F.2d 343 (8th Cir. 1980).

These proceedings at the Eighth Circuit represented the consolidation of two separate cases. In its appellants'

brief Tyson raised six issues, all dealing with the CWA. Petitioners raised twelve issues, and the City and the EPA raised an additional four issues to which petitioners had to reply. Altogether there were nearly 300 pages of briefs filed in this matter, and the combined appendices exceeded 1,500 pages. Petitioners documented over five hundred hours combined effort expended on appeal by the three law firms representing the petitioners.

In spite of the complexity and difficulty of the case, the effort expended, and the fact that petitioners prevailed on CWA issues (and, indeed, most of the issues on appeal in general), the Eighth Circuit summarily, and without explanation, or even waiting to hear from Tyson, denied petitioners' prayer for an award of attorneys' fees under 33 U.S.C. § 1365(b). When petitioned to reconsider and/or clarify its order denying attorneys' fees, the Eighth Circuit declined to do so.

Heretofore, the opinions of this Court and other courts have been to the effect that, absent some special or unusual circumstance, statutory schemes such as the one in question which provide for attorneys' fees entitle a "prevailing party" to an award of a reasonable attorneys' fee, *Hensley*, 461 U.S. 424. As stated by the Eleventh Circuit in *ASLF v. Tyson Foods, Inc.*, 897 F.2d 1128, 1143:

> The award of fees is within the discretion of the district court; however, the sound exercise of that discretion will not allow the court to deny fees and costs absent good cause. In a case like the instant one, where a citizens group has succeeded on the merits, we cannot conceive of any grounds that would justify a denial of fees and costs.

In this case, there is no such 'special circumstance' obvious on the face of the record. And, as indicated, the appeals court articulated none.

While the appropriateness of an attorneys' fee award inherently involves the use of discretion on the part of the assessing court, and is to be judged on that basis, the process should nevertheless be a reasonable one, based upon the appropriate considerations, and not arbitrary. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717 (5th Cir. 1974). As the court stated in that case:

> The reasonableness of the award is to be judged by the abuse of discretion standard of review. *Weeks v. Southern Bell Tel. & Tel. Co., supra; Culpepper v. Reynolds Metals Co., supra.* But in utilizing this standard we must carefully review the basis upon which the District Court made its award.
>
> It is at this juncture that we have difficulty with the district court order. The judgment does not elucidate the factors which contributed to the decision and upon which it was based. No correlation to the facts and figures submitted by the plaintiffs is visible.

It has been observed that one of the principle purposes behind the attorneys' fee criteria which this Court has evolved has been to remove the subjective process which otherwise would prevail with likely disparate results. *Pennsylvania v. Delaware Valley Citizens Council*, 478 U.S. 546 (1986) at 3096; *Norman v. Housing Authority of Montgomery*, 836 F.2d 1292, at 1299 (11th Cir. 1988).

The Eighth Circuit's response to petitioners' claim in this case is even more puzzling than was the district court's finding in *Johnson, supra.*

As it currently stands, this case raises the question as to whether a court is free to essentially ignore a petition for attorneys' fees, filed by a prevailing party, under a statutory scheme which contemplates the award of attorneys' fees for a prevailing party. Petitioners assert that the appellate court's decision in this regard is clearly

contrary on its face to the intent of the Act and this Court's decisions construing attorneys' fee provisions. This decision has serious implications for the viability not only of the citizens' suit provision of the CWA but in other federal statutory schemes providing for the awarding of attorneys' fees, since this Court has held that similar attorneys' fee provisions should be interpreted *pari passu*. *Northcross v. Memphis Bd. of Educ.*, 412 U.S. 427 (1973).

The citizens' suit provision of the CWA and other federal environmental regulatory schemes are potentially powerful enforcement adjuncts to the activities of the relevant government agencies. The appellate court's response to petitioners' fee application implies yet another element of risk for attorneys representing citizen plaintiffs. Not only must counsel consider the inherent difficulties of the litigation itself, along with other factors of risk, but, under the precedent set in this case, counsel may find no compensation at the end, even if successful; nor, indeed, even an explanation.

CONCLUSION

All three issues addressed above are appropriate for review by this Court, and have a significance beyond the interests of the parties to the suit. However, the real significance of this case, in light of the Eighth Circuit's opinion, cannot be adequately gleaned from an analysis of the individual issues enumerated above alone.

This case represents the type of citizen suit which Congress doubtless had in mind when it conceived of § 1365; a suit prosecuted by the citizens who were being

directly affected by the violator's conduct. The petitioners herein endured a decade and a half of abuse as a result of conscious conduct on the part of the City of Green Forest and Tyson Foods, while the governmental agencies charged with enforcement of the Clean Water Act took little or no action.

At this point, the penalties assessed in this case are a paltry fraction of those called for under the Act; the petitioners have had their right to enforce the Act against the City all but completely denied; and have been told that they or their attorneys must bear the costs of the appeals process which they prosecuted to enforce the Act in this case.

These results issue from holdings by the Appellate Court which are either in conflict with the holdings in other circuits or with this Court's prior decisions. In part, the errors in question may be the result of the large number of trial court errors which the Court of Appeals had to review. See, Appellate Court opinion, Appendix at App. 2. Or, they may be the result of too great a concern for "judicial economy" as Judge Lay suggested in his dissent. Whatever the reasons, if these errors are not corrected this case will have an adverse impact on the viability of the citizen suit enforcement mechanism of the Clean Water Act, especially as it applies to citizen victims such as the petitioners herein. Further, the role of the citizen suit as related to subsequently filed EPA actions will remain in dispute.

Wherefore, petitioners pray that their petition for a writ of certiorari to the United States Court of Appeals to the Eighth Circuit be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 89-1661-WA

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Appellee, v. CITY OF GREEN FOREST, ARKANSAS, Appellee, LEWIS STEPHEN WORK, et al., Appellants/Intervenors	*	Appeal from the United States District Court for the Western District of Arkansas

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Nos. 89-2549-WA, 89-2636-WA,
90-1011-WA & 90-1041-WA

LEWIS STEPHEN WORK, et al., Appellants/ Cross-Appellees v. TYSON FOODS, INC., and CITY OF GREEN FOREST, ARKANSAS, et al., Appellees/ Cross-Appellants	*	

Argued: October 10, 1990
Filed: December 18, 1990

Before LAY, Chief Judge, BRIGHT, and TIMBERS,* Circuit Judges.

TIMBERS, *Circuit Judge:*

Appellants Lewis Stephen work, et al. (the citizens or Work) appeal from two orders entered December 3, 1987 and March 24, 1989 in the Western District of Arkansas, Oren Harris, *Senior District Judge.* The first denied intervention in a government environmental enforcement action or consolidation of that action with an earlier citizens' action. The second denied another motion for intervention in the Environmental Protection Agency (EPA) action. The citizens appeal also from final judgments entered June 19, 1989 and August 24, 1989 after trial of the citizens' action. Appellee/cross-appellant Tyson Foods, Inc. (Tyson) appeals from the final judgments. Tyson also appeals, and the citizens cross-appeal, from the denial of Tyson's motion for reconsideration filed November 28, 1989. All appeals have been consolidated.

Work commenced the citizens' action against Tyson and the City of Green Forest (the City or Green Forest) on March 3, 1987, asserting claims pursuant to both the Clean Water Act (the Act or CWA), 33 U.S.C. §§ 1250-1387

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* Of the Second Circuit, sitting by designation.

(1988), and common law. On September 28, 1987, the EPA commenced an action against Green Forest and the State of Arkansas pursuant to the CWA. The government enforcement action resulted in a consent decree. The citizens' action proceeded to trial, resulting in a verdict against Tyson under the CWA; against Tyson and for the citizens on the common law claims; and for Green Forest on the citizens' remaining claims. The court previously had granted partial summary judgment for the City, dismissing the CWA claims against it. The court assessed penalties against Tyson pursuant to the CWA, payable to the United States Treasury.

On appeal, Work sets forth a laundry list of claimed errors by the district court: (1) in denying their motion to intervene and/or denying their motion to consolidate; (2) in dismissing their claims against Green Forest under the CWA; (3) in calculating the penalties assessed against Tyson under the CWA; (4) in various evidentiary and instruction-related matters; and (5) in dismissing medical claims of ten employees, directing a verdict against Patricia Hudson, and directing a verdict to deny an award of punitive damages.

On cross-appeal, Tyson also claims that the district court erred in various other respects, including: (1) in its instruction to the jury on discharger liability; (2) in failing to grant Tyson's motion for a directed verdict; and (3) in failing to grant Tyson's motion to dismiss.

For the reasons set forth below, we reverse the second order of the district court denying intervention in the government enforcement action and remand for the limited purpose of assessing attorneys' fees; we affirm the

final judgment entered in the citizens' action with respect to the CWA claims; and we affirm in part and reverse in part with respect to the common law claims.

I.

We summarize only those facts and prior proceedings believed necessary to an understanding of the issues raised on appeal. We also summarize briefly the statutory background of the CWA.

(A)

The CWA, enacted in 1972, creates a comprehensive program "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). As part of that program, § 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits all discharges of pollutants into navigable waters except those made in compliance with other sections of the Act, including § 402, 33 U.S.C. § 1342, which establishes the National Pollution Discharge Elimination System (NPDES).

Section 402(a) provides that the EPA shall issue NPDES permits authorizing effluent discharges in strict compliance with conditions specified in the permit. 33 U.S.C. § 1342(a). Section 402(b) allows each state to develop and administer its own permit program, provided that the program meets federal requirements. 33 U.S.C. § 1342(b). And Section 402(c) provides that the EPA shall suspend issuance of federal permits upon determining that a state has adequate authority to implement and enforce the permitting program within the state. 33 U.S.C. § 1342(c).

The Act directed the Administrator of the EPA to promulgate regulations setting limits on the pollution that can be discharged, delineated by three general types of "point sources," *id.* at § 1362(14): sources that discharge pollutants directly into navigable waters (direct dischargers); publicly owned treatment works (POTWs), which engage in the treatment of industrial sewage or industrial wastewater, *id.* at § 1292(2); and sources that discharge their pollutants not into navigable waters but into the POTWs (indirect dischargers). *National Ass'n of Metal Finishers v. EPA (NAMF)*, 719 F.2d 624, 633 (3d Cir. 1983) (discussing statutory framework of the CWA), *rev'd on other grounds sub nom. Chemical Mfrs. Ass'n v. N.R.D.C., Inc.*, 470 U.S. 116 (1985). "Congress recognized that the pollutants which some indirect dischargers release into POTWs could interfere with the operation of the POTWs, or could pass through the POTWs without adequate treatment." *Id.* Section 307(b)(1) of the Act provides that:

> "The Administrator shall . . . publish proposed regulations establishing pretreatment standards for introduction of pollutants into [POTWs] for those pollutants which are determined not to be susceptible for treatment by such treatment works or which would interfere with the operations of such treatment works. . . . Pretreatment standards under this subsection . . . shall be established to prevent the discharge of any pollutant through [POTWs], which pollutant interferes with, passes through or otherwise is incompatible with such works."

33 U.S.C. § 1317(b)(1).

For POTWs, the Administrator was to set effluent limitations based on "secondary treatment," *id.* at §§ 1311(b)(1)(B) and 1314(d)(1). These limitations were to

be applied through the NPDES permit for each POTW. *Id.* at § 1342; *NAMF, supra,* 719 F.2d at 633.

The Act authorizes several different enforcement actions if a NPDES permit holder fails to comply with the specified permit conditions. Section 309 authorizes the United States to enforce a federal or state permit through a variety of administrative, civil, and criminal mechanisms. 33 U.S.C. § 1319. A state may take similar action, under appropriate state law, in response to a state-issued permit. *Id.* at § 1342(b)(7). In addition, section 505(a)(1) of the Act permits private citizens to commence a civil action in certain situations against anyone "who is alleged to be in violation of . . . an effluent standard or limitation under this chapter," *id.* at § 1365(a)(1), which includes a federal or state NPDES permit or condition thereof, *id.* at § 1365(f). No such action, however, may be commenced under the following circumstances:

> "(A) prior to the sixty days after plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or
>
> (B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right."

Id. at § 1365(b)(1)(b). The CWA specifically provides that statutory and common law rights are not restricted: "Nothing in this section shall restrict any right which any person . . . may have under any statute or common law to

seek enforcement of any effluent standard or limitation or to seek any other relief. . . . " *Id.* at § 1365(f).

(B)

Green Forest is a small town in the Ozark Mountains of northwest Arkansas. It is located in Carroll County, which has a topography known as "karst". Karst is permeable limestone readily penetrated by surface water. Streams frequently submerge and re-emerge. Streams having an intimate contact with the groundwater system through sinkholes or other means are called "losing streams."

In 1953, the City constructed its POTW at its present location on Dry Creek, a losing stream. Dry Creek flows through the area where Work and the other citizens who commenced the citizens' action live. It is into Dry Creek that the POTW discharges.

In 1959, a poultry processing plant, Franz Foods, was constructed and began discharging a growing waste load into the POTW. Franz Foods was acquired by Tyson in 1968.

In December 1968, the City sought federal funding to construct a new POTW capable of meeting secondary treatment standards. In the grant application process, the EPA approved plans and specifications for the new POTW subject to conditions, including limitations on Tyson discharges. In May 1973, the City requested an NPDES permit, as required by the CWA, to operate its new POTW and discharge into Dry Creek, indicating the POTW should be capable of secondary treatment of

waste. The limitations on Tyson discharges however were not enforced. Tyson did not pretreat its waste or produce an effluent meeting the required criteria until 1985.

During the early 1970s, residents east of the City (including several of the citizens involved in this case) sued Tyson's subsidiary, Franz Foods, for maintaining a public nuisance. That action was settled in 1976 after the City's new POTW was completed; Franz Foods agreed not to discharge any waste that would alter Dry Creek's existing condition visually or chemically, or that constituted a violation of any City ordinance, or county, state or federal law.

The loading on the POTW continued to grow, and the POTW failed to meet the standards of its original permit. At the trial of the citizens' action, Tyson's expert witness admitted that, without pretreatment, there would be no way that a waste from a poultry-processing plant like Tyson's could comply with the POTW's design criteria.

The City received periodic warnings from environmental agencies regarding permit violations and other problems. When the POTW permit expired on May 1, 1977, a new permit was drafted. The Arkansas State Department of Pollution Control & Ecology wrote to the Mayor, stating the need for the City to negotiate a schedule of compliance with Franz Foods. In 1978, on a single-shift operation, Tyson processed approximately 260,000 pounds of chicken per day. In 1979, Tyson processed approximately 310,000 pounds of bird per day. POTW permit violations continued.

In April 1981, the EPA issued a new NPDES permit to the City for its existing facility, requiring an effluent that

met higher-quality water standards. In view of the City's inability to meet those standards, an administrative order set interim limits and a timetable for compliance.

In May 1983, a sinkhole opened in Dry Creek. The creek's entire flow ran directly into the ground. At this point, the POTW had a volume in excess of 1,000,000 gallons per day.

At some point in 1984, Tyson's production changed from a cut-up operation to a deboning operation, working with larger birds; this change increased its waste. Tyson then processed approximately 750,000 pounds of chicken per day.

In August 1984, the Arkansas Department of Health advised the City that a number of wells in the immediate vicinity of the sinkhole were being affected; that public water should be made available to the affected residents; and that the City should make efforts to improve the quality of the POTW's effluent.

Tyson completed a pretreatment facility in May 1985. Once it went on-line, the quality of the City's POTW effluent improved dramatically, falling from levels equivalent to diluted domestic sewage to levels well below secondary treatment standards. Tyson, however, continued to be the principal load on the POTW, which in turn continued to violate its now-strict permit. In 1986 Tyson converted to a double shift operation, processing 92 birds per minute per shift; this change was made in anticipation of increasing production capacity to 140 birds per minute per shift.

(C)

On November 28, 1986, the citizens sent notice to all parties, as required by 33 U.S.C. § 1365(b)(1)(A), of their intent to sue Tyson and the City pursuant to the CWA. After the action was commenced, the EPA commenced a separate environmental enforcement action. On November 25, 1987, Work filed a motion in the EPA action seeking intervention as of right and seeking consolidation. On December 3, 1987, the court denied the motions. Work did not appeal immediately from the order denying these motions.

On January 28, 1989, after engaging in settlement negotiations, the government lodged a proposed consent decree with Green Forest. An opportunity for public comment was provided. On March 17, Work filed a second motion to intervene in the government action. On March 24, the court again denied the motion. On March 29, the court approved the proposed consent decree. On April 20, Work filed a notice of appeal from the orders denying their motions to intervene of December 3, 1987 and March 24, 1989.

The separate citizens' action proceeded to trial. On April 12, 1989, the court entered partial summary judgment in favor of Green Forest, dismissing Work's CWA claims. The court found that the approved consent decree between the EPA and Green Forest precluded the citizens from pursuing their CWA claims. On May 12, after a six-week trial, the jury returned a verdict against Tyson for $254,401.50 on Work's common law claims and found Tyson guilty of 43 CWA violations. On June 16, the citizens moved for assessment of CWA penalties against

Tyson. On June 19, judgment was entered in favor of the City and against Work, and in favor of Work and against Tyson for common law damages. On June 29, Tyson moved for judgment n.o.v. This was denied on August 24, at which time the court assessed $43,000 against Tyson for CWA violations. Judge Harris' opinion assessing penalties is published at *Work v. Tyson Foods, Inc.*, 720 F. Supp. 132 (W.D. Ark. 1989). On September 7, Tyson moved for reconsideration, for judgment n.o.v., or for a new trial. Those motions were denied on November 28.

II.

(A)

We turn first to the threshold question of our jurisdiction to entertain Work's appeal, filed April 20, 1989, from the denial of two motions to intervene in the EPA action. Work claims that his motions for intervention should have been granted as of right. 33 U.S.C. § 136(b)(1)(B) and Fed. R. Civ. P. 24(a)(1); *see also United States v. Metropolitan St. Louis Sewer Dist.*, 883 F.2d 54, 56 (8th Cir. 1989) (holding that the CWA conferred upon a citizens' group intervention as of right).

It is well-settled that an order denying a motion to intervene as of right is a final appealable order. *Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519, 524 (1947); *Corby Recreation, Inc. v. General Elec. Co.*, 581 F.2d 175, 176 n. 1 (8th Cir. 1978); *Sellers v. United States*, 709 F.2d 1469, 1471 (11th Cir. 1983).

A notice of appeal from such an order must be filed within sixty days. Fed. R. App. P. 4(a)(1). In the instant

case, the notice of appeal from the denial of the first motion to intervene was not until after nearly sixteen months. Since an appellate court lacks jurisdiction over an untimely appeal, *United States v. Metropolitan Dist. Comm'n*, 865 F.2d 2, 4 (1st Cir. 1989), we lack jurisdiction over the December 3, 1987 order denying intervention.

The appeal from the second order presents a closer question. On its face, the appeal was filed timely: the order was entered March 24, 1989 and the appeal was filed April 20. Relying largely on *Hodgson v. United Mine Workers*, 473 F.2d 118 (D.C. Cir. 1972), however, appellees claim that the second motion "was merely a back door attempt to revive the trial court's earlier order so as to start the time for appeal running anew."

In *Hodgson*, the district court denied the appellant's first motion to intervene as of right on March 10, 1972. On June 20, the district court denied appellant's second motion to intervene. The appellant timely appealed the denial of the second motion. 473 F.2d at 122-23. On appeal, the court held that "the question of jurisdiction must be resolved by ascertaining whether the June 20 order . . . was merely a reinstatement of the court's March 10 ruling or whether it constituted a new determination by the District Court reached under circumstances materially changed from those existing in March." *Id.* at 125. The court went on to say that "[i]f the later order was only an attempt to revive the earlier order, it did not start the time for appeal all over again." *Id.* Ultimately, the court held that there were "changed circumstances" such that "the June 20 order . . . constituted a fresh evaluation

of the intervention application, well within the discretionary power of the District Court to make, and amenable to review on the merits by this court." *Id.* at 126-27.

Here, too, we find that the context in which the citizens sought intervention on March 17, 1989 was different from the context in which intervention and consolidation had been sought on November 25, 1987. By March 17, 1989, there was a proposed consent decree between the EPA and the City. In their second motion, the citizens made specific reference to the proposed settlement and articulated their specific objections to the consent decree as well as their concern (which was later confirmed) that it would be the basis for defendants' moving for dismissal of the citizens' action on the ground of collateral estoppel. Although the citizens had expressed concerns about possible settlement sixteen months earlier, the settlement possibility, in 1987, was merely inchoate. Consistent with *Hodgson*, we hold that the existence of the proposed consent decree resulted in a change in circumstances that made a renewed motion for intervention legitimate.

(B)

Since we find it appropriate to exercise jurisdiction over the appeal from the March 24, 1989 order, we hold that the court erred in denying the citizens leave to intervene, since the CWA expressly provides for intervention as of right. *Metropolitan St. Louis Sewer Dist., supra,* 883 F.2d at 56. Since we find, however, that the district court's denial of the motion, for the most part, was harmless error, we reverse and remand on that issue only for

the limited purpose of permitting the citizens group to seek attorneys' fees.

Although Judge Harris denied Work's formal intervention order, the citizens, *de facto*, were permitted to participate. As Judge Harris stated in his order, the citizens had the opportunity, of which they took advantage, to file their objections to the consent decree during the available public comment period. There is little else that they could have done had they formally intervened. *United States v. Ketchikan Pulp Co.*, 430 F. Supp. 83, 85 (D. Alaska 1977) (holding that "once intervenors have been given the opportunity to object to the decree they have had an appropriate day in court and a judgment on consent may be entered"). In that case, a consent decree under the CWA was entered over objections of environmental groups.

In denying the citizens' motion to intervene, Judge Harris relied explicitly on our decision in *DuBois v. Thomas*, 820 F.2d 943 (8th Cir. 1987). There we held that the district court was without subject matter jurisdiction to entertain a citizens' action commenced to compel the EPA to take investigatory and enforcement action, duties which we held were discretionary rather than mandatory. Although Judge Harris' reliance on *DuBois* in denying the citizens' intervention motion was somewhat misplaced, as a practical matter, *DuBois* supports our holding that the error here was largely harmless. That is so because commencing an enforcement action against Green Forest in the first instance was a discretionary rather than mandatory duty. Hence, Ultimately settling the action also was within the EPA's discretion. Had the citizens intervened, they still would not have been able to compel a

consent decree on their own terms. As we said in *DuBois*, the CWA "was not intended to enable citizens to commander the federal enforcement machinery." *Id.* at 949.

The citizens assert, however, that the denial of the intervention motion robbed them of their right to seek attorneys' fees. They point out that the citizens' suit predated the EPA action, and that their efforts were instrumental in spurring the EPA into finally taking action against the City. This has some force. We agree that the citizens should be permitted to seek their fees.

Accordingly, while we will not second-guess the terms of the consent decree itself, we reverse the denial of intervention insofar as it precluded the citizens from seeking their fees, and we remand the case on this issue for the district court to determine the proper amount of such fees.

III.

We turn next to the citizens' appeal from the district court's denial of their motion to consolidate. Work asserts that, since there was little or no difference between the issues presented in both actions, their motion to consolidate should have been granted.

Although Work failed to designate that the citizens were appealing from the denial of the motion to consolidate as well as the denial of the motion to intervene, that omission was not prejudicial to appellees. Notices of appeal are to be liberally construed. Fed. R. App. P. 3(c); *McGowne v. Challenge-Cook Bros., Inc.*, 672 F.2d 652, 659

(8th Cir. 1982). We have jurisdiction to review the court's denial of consolidation on the merits.

Pursuant to Fed. R. Civ. P. 42(a), a district court "may order" consolidation. The order denying Work's motion to consolidate should not be disturbed unless it is determined that the court clearly abused its discretion. *Shump v. Balka*, 574 F.2d 1341, 1344 (10th Cir. 1978); *Gentry v. Smith*, 487 F.2d 571, 581 (5th Cir. 1973); 9 Wright & Miller, Federal Practice and Procedure § 2383 (1971); *see also Chicago, Rock Island & Pacific R.R. v. Williams*, 245 F.2d 397, 404 (8th Cir.), *cert. denied*, 355 U.S. 855 (1957) (discussing court's discretion pursuant to Rule 42(b)). The record here supports the district court's denial of the motion to consolidate. The citizens sought punitive damages, compensatory damages for personal injuries, and relief for many common law tort claims. These claims were not relevant to the EPA action. Moreover, the citizens' claims were to be tried before a jury, while the EPA action was to be tried before the court.

We hold that, in denying Work's motion to consolidate, the court properly exercised its discretion in the interests of expedition and economy.

IV.

We turn now to the CWA claims raised by both Work and Tyson.

(A)

First, the citizens assert error in that they never had a chance to present their CWA claims against Green Forest.

The district court found that the citizens were precluded, by the doctrines of res judicata and collateral estoppel, from pursuing their CWA claims. We agree that res judicata barred these claims.

The doctrine of res judicata was articulated in *Lovell v. Mixon*, 719 F.2d 1373, 1376 (8th Cir. 1983), in which we explained that

> "The doctrine of res judicata bars a later suit when (1) the first suit resulted in a final judgment on the merits; (2) the first suit was based on proper jurisdiction; (3) both suits involved the same cause of action; and (4) both suits involved the same parties or their privies. . . . [B]oth [collateral estoppel and res judicata] are applied only when the party against whom the earlier decision is being asserted had a 'full and fair opportunity' to litigate the issue in question."

Work concedes that the CWA claims made in the citizens' suit were the same as those made by the EPA. He argues, however, that, since the citizens were not involved in the action that resulted in the consent decree, they should not have been precluded from pursuing their CWA claims independently. We disagree.

The citizens' action provision of the CWA casts the citizen in the role of a private attorney general. *Atlantic States Legal Found., v. Tyson Foods, Inc.*, 897 F.2d 1128, 1131 n. 5 (11th Cir. 1990). As the Supreme Court stated in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987), however, the CWA was intended to be enforced primarily by the government:

> "The bar on citizen suits when governmental enforcement action is underway suggests that

> the citizen suit is meant to supplement rather than supplant governmental action. The legislative history of the Act reinforces this view of the role of the citizen suit. The Senate Report noted that '[t]he Committee intends the great volume of enforcement actions to be brought by the State,' and that citizen suits are proper only 'if the Federal, State, and local agencies fail to exercise their enforcement responsibility.' "

(Quoting S. Rep. No. 92-414, p. 64 (1971), *reprinted in* 2 A Legislative History of the Water Pollution Control Act Amendments of 1972, p. 1482 (1973)). In *Gwaltney* the Court held that citizen suits could not be brought for wholly past violations of the Act, stating that permitting such suits "could undermine the supplementary role envisioned for the citizen suit." *Id.* at 60. *See also DuBois, supra,* 820 F.2d at 949 (the CWA allows citizens to *supplement* government enforcement power).

In this case, we are faced squarely with the question whether citizens' claims brought prior to a government action are properly dismissed when a consent decree is entered in a later-filed EPA action. Recognizing the preeminent role that government actions must play in the CWA enforcement scheme, we hold that they are.

The preclusive effect of a consent decree on a private enforcement action was addressed by the court in *United States v. Olin Corp.*, 606 F. Supp. 1301 (N.D. Ala. 1985). There, the State of Alabama and the United States sought injunctive relief to require the Olin Corporation to eliminate DDT from, and restore the environment in, the vicinity of Redstone Arsenal. As part of the resolution of the case, Olin, the United States, and Alabama entered into a consent decree.

The court stated that "once a state represents all of its citizens in a *parens patriae* suit, a consent decree or final judgment entered in such a suit is conclusive upon those citizens and is binding upon their rights." *Id.* at 1304. The court held that the question whether the citzens' [sic] suit was barred by res judicata turned on whether the prior litigation was a *parens patriae* suit. "In a proper *parens patriae* suit, the state or federal government is deemed to represent all of its citizens. . . . Traditionally, *parens patriae* lawsuits involved a government suing to enjoin alleged nuisances caused by water or air pollution." *Id.* at 1305. The court held that the plaintiffs' suit for injunctive relief was barred by res judicata because the same relief had been sought in the action brought by Alabama and the United States in a *parens patriae* capacity. *Id.* at 1308; *see also Student Pub. Interest Group, Inc. v. Georgia-Pacific Corp.*, 615 F. Supp. 1419, 1432 (D.N.J. 1985) ("The consent judgment which resolved the previous lawsuit against defendant forecloses subsequent litigation as to all claims adjudicated therein.").

In this case, the citizens place great emphasis on the fact that their action was commenced prior to the EPA enforcement action; they suggest that because the CWA expressly provides that citizens cannot commence an action before giving the EPA sixty days notice, 33 U.S.C. § 1365(b)(1)(A), the failure of the EPA to commence an enforcement action within that time frame means that "the subsequent filing of an enforcement action by the Government could not supplant the citizen enforcement action already pending." We recognize that there may be some cases in which it would be appropriate to let a citizens' action go forward in the wake of a subsequently-

filed government enforcement action. In view of the consent decree in the instant case negotiated by the EPA and Green Forest, however, this is not such a case.

Some lower courts in other circuits have reached a result contrary to the one we reach today. *E.G., Atlantic States Legal Found, Inc. v. Koch Refining Co.*, 681 F. Supp. 609, 614 (D. Minn. 1988) (holding that district court had "no discretion" to dismiss a properly filed citizen suit when a government enforcement action was later brought covering the same claims); *Sierra Club v. Coca-Cola Corp.*, 673 F. Supp. 1555 (M.D. Fla. 1987) (consent decree entered into by the EPA and the defendant did not require dismissal of the Sierra Club action for the same CWA violations when the Sierra Club, a third party in the case, did not consent). In view of the preeminent role that must be afforded the EPA in enforcing CWA act violations – a role contemplated by the legislative history and recognized by the Supreme Court in *Gwaltney* – we hold that it was proper for the district court to dismiss Work's CWA claims against Green Forest after the latter had entered into a consent decree with the EPA. The EPA is charged with enforcing the CWA on behalf of all citizens. Since citizens suing under the CWA are cast in the role of private attorneys general, as a practical matter there was little left to be done after the EPA stepped in and negotiated a consent decree. See our discussion under Part II(B), *supra*. Fines recoverable pursuant to the CWA are payable to the United States Treasury and would not have been recovered directly by the aggrieved citizens had their action continued. While the citizens might have preferred more stringent terms than those worked out by the EPA, such citizens are no more aggrieved than citizens who are

precluded from commencing an action in the first instance because of pending agency action.

Although the issue was not framed in terms of res judicata or collateral estoppel, the comments of the Southern District of New York in *Hudson River Fishermen's Ass'n v. County of Westchester*, 686 F. Supp. 1044 (S.D.N.Y. 1988) are instructive. Responding to "HudFish's" argument that dismissal of its citizens' action would leave the group without a remedy, the court stated:

> "We are particularly unimpressed with this latter argument. The thrust of the CWA is to provide *society* with a remedy against polluters in the interest of protecting the environment. Section 101 of the CWA, 33 U.S.C. § 1251(a). If the Government's action achieves that end, the fact that HudFish or any other private attorney general is barred from duplicating that effort should hardly seem surprising or harsh. The Government, of course, as representative of society as a whole, usually is in the best position to vindicate societal rights and interests. In those instances where, for whatever reasons, the Government fails or declines to take action, the CWA allows citizens acting as private attorneys general to fill the void. That does not mean, however, that HudFish is *ipso facto* entitled to its own, 'personalized' remedy in this or any other CWA case."

Id. at 1052.

It should be borne in mind that the citizens in this case were permitted to prosecute their CWA claims against Tyson, as well as their common law claims against both Tyson and the City. It was only the CWA claims that the district court found to be barred by res judicata and collateral estoppel.

We hold that that ruling was proper.

(B)

Tyson's claim that the court erred in refusing to dismiss claims against *it* based on res judicata, however, need not detain us long. In essence, Tyson asserts that the EPA's decision *not* to commence an action against it is binding upon the citizens. This novel proposition flies in the face of the clear language of the citizens' action provision of the CWA, as well as the legislative history, which make clear that agency inaction is precisely the circumstance in which private action is appropriate. *Student Pub. Interest Research Group, supra,* 615 F. Supp. at 1427 ("Defendant's interpretation of the Act would render citizen-suits impossible when they are required most: instances where an agency encourages a polluter to believe its unlawful behavior will go unpunished.").

(C)

We next address Tyson's argument that its motion to dismiss should have been granted because of the lack of regulatory definitions of "interference" and "pass-through." See our discussion of the statutory framework of the CWA, under part I(A), *supra.*

The CWA regulations provide that "[a] User may not introduce into a POTW any pollutant(s) which cause Pass Through or Interference." 40 C.F.R. § 403.5 (1989). Tyson relies on the holding in *NAMF, supra,* 719 F.2d at 640-41, *rev'd on other grounds sub nom. Chemical Mfrs. Ass'n v. N.R.D.C., Inc., supra,* 470 U.S. 116, to support its contention. Tyson misreads the holding in *NAMF.* As we have pointed out, *NAMF* merely held "that liability could not

be imposed on industrial users without proof of causation." *Arkansas Poultry Fed'n v. EPA*, 852 F.2d 324, 328 (8th Cir. 1988). The *NAMF* court rejected a definition of "interference" that would have created liability for causing *or* "significantly contribut[ing]" to a violation of an NPDES permit, 719 F.2d at 639, holding that:

> "We conclude that given the language and purpose of the Act, an indirect discharger cannot be liable under the prohibited discharge standard unless it is a cause of the POTW's permit violation of sludge problem. *If the definition of 'interference' required that an indirect discharger be both 'the cause of' and 'significantly contribute to' the POTW's permit violation, it would be consistent with that causation requirement.* As written, however, the definition fails to require such causation, and thus violates the clear meaning of the Act."

Id. at 641 (emphasis added).

While the *NAMF* court rejected the then-existing regulatory *definitions* of "interference" and "pass-through," 719 F.2d at 641, the regulatory *prohibitions*, as Work points out, remained intact. We agree with the citizens that the CWA's prohibitions against "interference" and "pass-through" are not unconstitutionally vague, but adequately apprised Tyson that it was not to cause the City to violate its NPDES permit.

We hold that the district court properly denied Tyson's motion to dismiss.

(D)

We next address Tyson's claim that the district court erred in denying its motion for a directed verdict pursuant to *Gwaltney, supra*, which held that citizens' actions are not permitted for wholly past violations of the CWA. 484 U.S. at 59. Tyson points out that it constructed an advanced pretreatment facility at substantial expense, which went on-line in 1985, subsequent to which Tyson claims it "never exceeded the agreed local limits designed for optimum operation of the POTW."

The citizens assert that violations of the City's permits continued after 1985. Work asserts further that Tyson's reliance on the affirmative defense of compliance with local limits does not get Tyson off the hook. CWA regulations provide for an affirmative defense for compliance with a local limit if that limit was *designed to prevent pass through and/or interference*, 40 C.F.R. § 403.5 (a)(2)(ii)(A) (1989), and if the POTW user "did not know or have reason to know that its Discharge, alone or in connection with discharges from other sources, would cause Pass Through or Interference". *Id.* at § 403.5(a)(2)(i). We agree with Work that Tyson has not established these conditions.

Gwaltney makes clear that the citizens' suit provision "confers jurisdiction over citizen suits when the citizen-plaintiffs make a good-faith allegation of continuous or intermittent violation . . . . " 484 U.S. at 64. Judge Harris, in this case, explicitly found that "[a] review of the plaintiff's second amended complaint makes it indelibly clear that the plaintiffs have made good-faith allegations of ongoing violations by Tyson." *Work, supra*, 720 F. Supp. at

137. The judge found, moreover, that there was "substantial evidence adduced at trial establishing a reasonable likelihood of a recurrence of intermittent violations before and since November 1985 when Tyson's new treatment facility began operating . . . ." *Id.* at 138. Our review of the record discloses no reason for disturbing Judge Harris' finding in this regard.

We hold that the district court properly denied Tyson's motion for a directed verdict.

(E)

Tyson also claims that the court erred in instructing the jury on discharger liability under the CWA. True, two of the instructions given by Judge Harris – those relating to direct discharger liability and liability applicable to NPDES permit holders – were wholly irrelevant to this case. Tyson is an indirect discharger and thus could not be liable pursuant to those theories.

We hold, however, that this error was cured when Judge Harris subsequently gave the jury the proper instruction on indirect discharger liability. The judge stated:

> "Also, if you find by a preponderance of the evidence that Tyson Foods, Inc. has violated the Clean Water Act by causing the City of Green Forest, Arkansas, to violate a provision of its Clean Water permit, you must determine the number of occasions on which Tyson has violated the Clean Water Act.
>
> In order to make this determination, you must determine how many violations by the

> City of its Clean Water Act permit were caused by Tyson Foods, Inc."

The evidence adduced all related to Tyson's role as an indirect discharger. The jury's verdict was consistent with the instructions given by the judge with respect to indirect discharger liability. In *EEOC v. Atlantic Community School Dist.*, 879 F.2d 434, 437 (8th Cir. 1989), we explained that "[j]ury instructions are subject to the 'harmless error' rule requiring a determination of whether the error affected the 'substantial rights of the parties." (citations omitted).

We hold that in this case the judge's error in giving superfluous instructions relevant only to direct dischargers and permit holders was harmless, in light of his correct instruction on indirect discharger liability.

(F)

This brings us to Work's claim that the district court erred in assessing $43,000 in penalties against Tyson for CWA violations. The jury found Tyson guilty of 43 separate violations. The court assessed penalties in the amount of $1,000 per violation. *Work, supra,* 720 F. Supp. at 139.

Work claims that the district court erred in declining the citizens' request to instruct the jury that a violation of a thirty-day average effluent limitation constitutes thirty separate daily violations of the Act. *Atlantic States Legal Found., supra,* 897 F.2d at 1139. We agree with the majority of the courts that have addressed the issue that violation of a monthly average effluent should be counted as thirty separate violations. *Id.* at 1139. We find, however, that the

district court's failure specifically to articulate this rule in its jury instructions in this case was harmless error.

In *Atlantic Community School District, supra,* we held that the district court's failure to give a proposed instruction did not affect the relevant party's "substantial rights":

> "Because EEOC's theory of the case was apparent to the jury throughout the trial, and because the instructions given neither failed to guide the jury on the central issue of age discrimination nor inhibited the jury in making such a finding, error in failing to give the proposed instruction, if error there were, would have been harmless. In sum the jury could have, but simply chose not to, agree with EEOC's theory of the case."

879 F.2d at 437 (citation omitted).

In this case, too, the jury could have agreed with Work that Tyson was guilty of many more than 43 violations of the CWA. The court simply instructed the jury that it was required to "determine how many violations by the City of its Clean Water Act permit were caused by Tyson Foods, Inc." Work's expert testified at trial that there were 720 violations "assuming that a violation of the 30-day average permit for administrative order requirement is tantamount to 30 separate daily violations . . . . " As Tyson points out, however, there also was evidence from which the jury could have concluded that the problems with the POTW were primarily the fault of the City rather than Tyson. Furthermore, the jury had before it reports of discharges calculated on a daily, weekly, and monthly basis.

In the district court's opinion, where, *inter alia*, it assessed penalties against Tyson, the court stated that it "contrue[d] the decisions of the jury to be that there were violations on *43 separate days*." *Work, supra*, 720 F. Supp. at 138 (emphasis added). Earlier in that opinion, the court stated that it had heard and had the benefit of the entire record in the case. *Id.* at 137. The opinion indicates, moreover, that the court considered the law applicable to the assessment of penalties. For example, in the section addressing *Gwaltney*, the court referred to the Fourth Circuit's holding that each violation of monthly averages for discharge of pollutants amounts to a violation for each day of the month. *Id.* at 135.

We find no reason to disturb the court's construction of the jury award; nor do we find that its failure to use Work's proffered jury instruction was anything other than harmless error, if indeed it was error at all. The jury was made aware, through counsel's questions, that it could find more than 700 violations of the CWA if it so chose. Although we would be more comfortable with the jury instructions if they had clearly articulated the rule with respect to monthly average permit violations, its failure to do so was at most harmless error.

Work argues further, however, that the court erred in assessing only a $1,000 fine per violation. We disagree. We hold that the assessment was within the proper exercise of the court's discretion.

Work relies almost exclusively on the Eleventh Circuit's decision in *Atlantic States, supra*, for the proposition that the district court erred in failing to assess higher penalties. In *Atlantic States*, the court of appeals held that

the district court abused its discretion in levying no penalty whatsoever against the defendant after violations of the CWA had been established. The court stated that "[w]hile the amount of penalty to be levied is discretionary with the district court, its determination, based solely on the good faith efforts of [the defendant] to comply with the law, that no penalty was appropriate was and would be an abuse of discretion." 897 F.2d at 1142. The court remanded the case to the district court with the direction that, if it chose not to impose the maximum penalty under the Act, it "reduce the fine *in accordance with the factors spelled out in section 1319(d)*, clearly indicating the weight it gives to each of the factors in the statute and the factual findings that support its conclusions." *Id.* at 1142 (emphasis added). In the instant case, unlike in *Atlantic States*, the court did impose a penalty after considering, in substance, the matters contemplated by 33 U.S.C. § 1319(d).

Section 1319(d) provides that violators shall be subject to a maximum penalty of $10,000 for violations before February 4, 1987 and $25,000 for violations thereafter. It also provides that:

> "In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and any such other matters as justice may require."

33 U.S.C. § 1319(d).

In its opinion addressing penalties, the district court here explicitly considered "the extent of violations as well as the number of violations through the years"; "[a]bility to pay and litigation considerations"; and "the policy by EPA in arriving at just and reasonable penalties under the statute." *Work, supra,* 720 F. Supp. at 138-39. The court also stated that:

> "Defendant Tyson has strongly contended that a new facility of the defendant was undertaken and is now in place, operating to alleviate the previous violations at a cost in excess of a million dollars. The defendants insist that the flow of wastewater from its plant through the facility of Green Forest would prove [sic] and has already without question alleviated the previous violations."

Id. at 138.

The district court, in its opinion, relied on the old version of § 1319(d), which was in effect at the time the citizens' action was commenced. 720 F. Supp. at 135. At the time the court assessed penalties, that section had been amended to provide for higher penalties and to provide specific factors, set forth above, for district courts to consider when assessing penalties. While not referring to the new § 1319(d), however, in essence the court considered precisely those factors Congress found appropriate – i.e., defendant's conduct, good faith, and financial situation.

We hold that the court's failure precisely to invoke the talismanic language of the new § 1319(d) does not rise to the level of reversible error. We affirm the court's assessment of CWA penalties.

We have considered that parties' other claimed errors with respect to the CWA, and we find them to be without merit.

V.

We turn next to Work's claimed errors with respect to various evidentiary rulings made by the district court, relevant to both the CWA and common law claims. Work claims that the court erred in applying a "statute of limitations" to the evidence that it permitted to be introduced in Work's case against Tyson. The statute of limitations for CWA violations is five years. The court excluded evidence pre-dating that period. Work also claims error in that the court excluded evidence of a settlement in prior litigation reached between Franz Foods (Tyson's subsidiary) and some of the citizens in the instant case.

Work points out that the evidence of prior violations was relevant to such issues as Tyson's knowledge and culpability, even if Tyson could not be held liable for violations pre-dating the statute of limitations period. Furthermore, he points out that, pursuant to Fed. R. Evid. 408, a settlement can be introduced in evidence for purposes other than to show liability.

Work is right that there is no rule that automatically excludes evidence pre-dating a statute of limitations period. In this case, it may have been error for the court automatically to exclude considerable evidence that was relevant to Tyson's culpability. Most of the evidence that Work complains should have been admitted, however, was relevant primarily for determining punitive damages. As stated below, we are remanding the case for the

purpose of deciding the issue of punitive damages. To the extent the evidence was not admitted where it might have had some tangential relevance to other claims, however, we hold that the error was harmless, particularly since the evidence would have been largely cumulative with respect to many of Work's claims for relief. As for the admissibility of such evidence, we have made it clear that "[e]ven with a clear showing of abuse, the error must have affected the substantial rights of the parties to warrant reversal of the district court." *Hogan v. American Tel. & Tel. Co.*, 812 F.2d 409, 410 (8th Cir. 1987). Any such error in the instant case did not rise to that level.

With respect to the exclusion of the settlement agreement, suffice it to refer to "our rule that the trial court's ruling on the admissibility of evidence will not be disturbed absent a clear and prejudicial abuse of discretion." *Wade v. Haynes*, 663 F.2d 778, 783 (8th Cir. 1981), *aff'd sub nom. Smith v. Wade*, 461 U.S. 30 (1983). The exclusion of the settlement agreement was well within the court's discretion.

VI.

This brings us to Work's claimed errors with respect to the trial of the common law claims.

(A)

Turning first to the directed verdict against an award of punitive damages, a review of the record makes clear that the court was under a misapprehension of the law

with respect to the relevant Arkansas law. The court stated that:

> "Punitive damages is a harsh rule of law.
>
> . . . .
>
> You've got the intent of intentional injury, and I don't think there's any testimony in any of this record at all that would serious [sic] contend that Green Forest or Tyson in their own mind and heart were going to do this intentionally just to punish. If you can show me any testimony otherwise, I probably could be persuaded."

The judge's view that a directed verdict was appropriate because Tyson did not "intentionally" pollute "just to punish" was error as a matter of Arkansas law.

We recently summarized Arkansas law on punitive damages and explained that the issue had been properly submitted to the jury in a case involving exposure to chemicals:

> "For punitive damages to be awarded under Arkansas law, the plaintiffs must show malice, either express or inferred. Inferred malice requires that the defendant knew or should have known of the potential harm, but proceeded anyway with conscious indifference to the possibility of injury. Witnesses testified at trial that Dow knew of the dangers of DBCP as early as 1961, and yet did nothing. Open cans of DBCP were dumped in open waste pits, and the smell of the chemical was repeatedly detected in the plant. Dow took no precautions to protect its employees. This evidence was sufficient to justify submitting the punitive damages issue to the jury."

Loudermill v. Dow Chemical Co., 863 F.2d 566, 571 (8th Cir. 1988). Under Arkansas law, knowledge and indifference are enough for punitive damages. The Arkansas Supreme Court expressly has held that a deliberate intent to injure is not required. *National By-Products v. Searcy House Moving Co.*, 292 Ark. 491, 494, 731 S.W.2d 194, 195-6 (1987).

In this case, the fact that Tyson may not have intended to "punish" the citizens is not dispositive of the punitive damages issue. There was evidence from which the jury could have inferred that Tyson knew the risk involved to drinking water because of its chicken operations, and yet Tyson acted for years with indifference to that risk.

We hold that the court erred in directing a verdict against an award of punitive damages and we remand the case for determination of that issue. In re-trying that issue, the court should consider carefully the admissibility of evidence predating the applicable statute of limitations period and should exclude evidence only if its prejudicial value outweighs its probative value. Fed. R. Evid. 403.

We next address the citizens' contention that the court erred in directing a verdict against Patricia Hudson and against the medical claims of ten citizens. We hold that the court erred in this respect.

Hudson's claim was for alleged damage to real property. Counsel for Tyson asserted that "the credible testimony in the record is that she received fair market value [for her property] without regard to any alleged pollution." Hudson, however, had testified at trial that water

pollution had devalued her land by $69,000 – the difference between what she and her husband paid for the property and what they ultimately sold it for. In arguing against Tyson's motion for a directed verdict, counsel for the citizens pointed out that there was evidence on both sides, and that the question of property damage should be left for the jury. The court, however, ruled that "on the question of credibility, I will grant the motion."

The court clearly usurped the jury's role in ruling on Tyson's motion. We have made it clear that, in ruling on a motion for a directed verdict, the court should consider only evidence favoring the non-moving party. *Dace v. ACF Indus.*, 722 F.2d 374, 376 (8th Cir. 1983). Granting such motions is appropriate only where the evidence is such that, *without weighing the credibility of the witnesses*, there can be but one reasonable conclusion as to the verdict. *Mulholland v. Schneider Service Co.*, 661 F.2d 708, 711 (8th Cir. 1981). In the instant case, the court explicitly considered credibility in granting Tyson's motion. Indeed, credibility was the very basis for his ruling.

In view of this clear error, which prejudiced Hudson, we are compelled to reverse and remand to the district court for reconsideration of Hudson's claim.

Similarly, we hold that it was error for the court to have directed a verdict to deny the medical claims of ten of the citizens. The citizens testified as to medical complaints and also adduced the evidence of a medical doctor. The defendants presented no rebuttal evidence. The court, however, ruled: "The Court thinks there's just not enough testimony in this record to justify a jury taking the time to determine whether or not they're entitled to

damage because they had the stomach ache and diarrhea. Who doesn't have it occasionally?"

We hold that the court usurped the jury's function. The medical claims should have been submitted to the jury. We remand with instructions that the court do so.

(C)

We turn next to Work's claims of error with respect to the court's instructions on inverse condemnation and property damage. The citizens claim that the court erred in instructing the jury that the plaintiffs had the burden of proving "that the City of Green Forest knew by its discharge of wastewater into Dry Creek it was taking the property. . . . " According to Work, "[i]t is sufficient that the City took some action which had the *effect* of taking the property. The City's intent or knowledge is not determinative." We agree.

The citizens rely on the Arkansas Supreme Court's recent decision in *Robinson v. City of Ashdown*, 301 Ark. 226, 783 S.W.2d 53 (1990), for the proposition that intent or knowledge *is irrelevant* to the issue of taking. The City relies on the same case for the proposition that knowledge or intent *is essential*.

Robinson involved a claim for inverse taking where the plaintiffs' home had been flooded intermittently with effluent from the city's sewer system over a nine-year period. There was no question that the city was aware of the problem. The Arkansas Supreme Court was presented with the question whether "instances of negligence, with respect to which the city has immunity from suit, may, if

sustained a long time, amount to inverse condemnation." *Id.* at 227-28, 783 S.W.2d at 54. The court held that the sustained negligence did constitute an inverse taking. *Id.* at 228, 783 S.W.2d at 54.

The evidence in this case indicates that the City allowed excessive levels of effluent to enter Dry Creek for decades. The *Robinson* court explicitly stated that negligence, sustained over a long period of time, can be the basis of an inverse condemnation claim. The facts of *Robinson* do not indicate that the City in that case ever intended to take the property. Green Forest's reliance on the statement in Robinson that a municipality is liable when "its actions are shown to be intentional," *id.* at 232, 783 S.W.2d at 56, is misplaced. That statement does not mean that the City must have intended to take the property. Such an interpretation would contradict the holding of the case. That passage simply requires that the City intended its action, not the results of its action. The *Robinson* case controls our decision and requires that the citizens be allowed a new trial on their damage claims for inverse condemnation.

On remand, the district court is instructed to correct other errors, pointed out by the citizens and discussed below, with respect to its instructions on inverse condemnation and property damage (which errors, standing alone, might not have compelled reversal were it not for the fatal error with respect to the issue of intent).

The court erred in stating that the citizens had to show "that the taking of property occurred on or after March 3, 1984." Although it was proper for the court to apply a three-year statute of limitations to the taking

claims, the Arkansas Supreme Court has made clear that the limitations period begins to run only " 'at the time when it becomes obvious that a permanent injury has been suffered.' " *City of Springdale v. Weathers*, 241 Ark. 772, 774, 410 S.W.2d 754, 756 (1967) (citation omitted). The court's instruction here did not make this clear.

We also find that it was error for the court to have instructed the jury that it was to consider "enhancement of the property, if any, to the value of such plaintiff's land which resulted from the extension of the city water to such property." The citizens are correct that it was proper for the jury to have considered only any enhancement that *was the direct result of a taking, e.g., McMahan v. Carroll County*, 238 Ark. 812, 384 S.W.2d 488 (1964). The extension of city water here was not such an enhancement. This error should be corrected with regard to plaintiff's claims against Tyson as well as the City.

VII.

To summarize:

We hold that we are without jurisdiction to consider the denial of Work's first motion to intervene, but that we do have jurisdiction to consider the denial of the second intervention motion. Since the court erred in denying that second motion, we remand for consideration of attorneys' fees. We hold that the court properly exercised its discretion in denying Work's motion to consolidate. We hold further that the court properly dismissed the CWA claims against the City based on res judicata.

With respect to both parties' claimed errors relating to the trial of the CWA claims against Tyson, we affirm the judgment of the district court in its entirety, finding no prejudicial errors.

With respect to the trial of the common law claims against Tyson, we substantially affirm but reverse and remand in part. We hold that the court erred in directing verdicts against Patricia Hudson, against the medical claims of ten citizens, and against the citizens on their punitive damages claims. On remand, the court is instructed to submit these claims to the jury. Specifically with respect to the punitive damages claim, the court is further instructed to make rulings on the admissibility of evidence consistent with Fed. R. Evid. 403.

With respect to the trial of the common law claims of inverse condemnation against the City, we reverse and remand based on the court's erroneous instruction on the issue of intent. On remand, the court is further instructed to correct other errors with respect to its instructions.

We have considered the parties' other claims or error, and find them to be without merit.

Affirmed in part, reversed in part, and remanded.

LAY, Chief Judge, concurring and dissenting.

I concur in part and dissent in part. I dissent as to the district court's determination of the number of Clean Water Act violations committed by Tyson.

I dissent with regard to the court's affirmance of the Clean Water Act penalty calculation against Tyson. The district court refused to give plaintiff's proposed instruction that would have explained to the jury that each

monthly average violation must be construed as thirty individual daily violations. The majority concedes that the court erred in refusing this instruction, which is firmly rooted in the text of the Act. The jury found 43 violations, an erroneous figure that does not correspond to any view of the evidence. The district court admitted the verdict was ambiguous when the judge stated he had to "construe" the verdict to mean there were violations on forty-three separate days.

No doubt the faulty instruction confused the jury. There is nothing in the record that makes me confident that they determine the correct number of violations. Perhaps too eager to avoid relitigation of this case, the majority simply declares the error harmless and attempts no analysis or explanation for its decision. The majority goes on to affirm the judge's penalty calculations, relying on the fact that the calculations are discretionary. The judge's discretion to set the amount of the penalty, however, does not carry over into the jury's province to determine the number of violations. The judge exercised his discretion to set the amount of penalty relying on the jury's determination of the number of violations. Had the jury found a different number of violations, the judge, if he was properly enforcing the Act, would have set a different penalty. Given the serous [sic] doubt about whether the jury properly determined the number of violations, we should not let the penalty calculation stand.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-1661WA	*	
United States Environmental Protection Agency,	*	Appeal from the United States District Court for the Western District of Arkansas
Appellee,	*	
vs.	*	
City of Green Forest, Arkansas,	*	
Appellee.	*	
Lewis Stephen Work, et al.,	*	
Appellants/Intervenors.	*	
* *	*	
No. 89-2549WA; 89-2636WA 90-1011WA; 90-1041WA	*	
Lewis Stephen Work, et al.,	*	
Appellants/ Cross-Appellees,	*	
vs.	*	
Tyson Foods, Inc., and City of Green Forest, Arkansas, et al.,	*	
Appellees/ Cross-Appellants.	*	

JUDGMENT

(Filed Feb. 25, 1991)

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in part and reversed in part and the cause is remanded to the district court for proceedings consistent with the opinion of this Court.

December 18, 1990

A true copy. /s/ Robert D. St. Vrain

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

MANDATE ISSUED: 2/22/91

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 89-1661/2549/2636/90-1011/1041WA

Lewis Stephen Work, et al., Appellants, vs. The City Green Forest, etc., et al., Appellees.	* * * * * * * * * *	Appeal from the United States District Court for the Western District of Arkansas

(Filed Feb. 27, 1991)

The Court, having considered appellants' motion for attorneys' fees, costs and expenses and appellees' objection to the motion, hereby orders that each party bear his or its own costs.

February 25, 1991

A true copy. /s/ Robert D. St. Vrain

ATTEST:

CLERK, U.S., COURT OF APPEALS, EIGHTH CIRCUIT

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

STEVE WORK, et al. PLAINTIFFS

v. NO. 87-2034

TYSON FOODS, INC., et al. DEFENDANTS

MEMORANDUM OPINION

(Filed Aug. 24, 1989)

This action was commenced by the plaintiffs filing the original complaint March 3, 1987. The plaintiffs sought permission and filed their second amended complaint September 16, 1988, as a civil action pursuant to the citizens suit provision, Section 505 of the Federal Clean Water Act (the Act), as amended, 33 U.S.C. § 1365(a), § 1365(a)(2), § 1365(e), § 1370, § 1345, § 1314, § 1318(a), § 1319, § 1317, § 1311, and § 1251, together with various administrative orders issued by the Environmental Protection Agency (EPA), to the City of Green Forest (the City) and the National Pollutant Discharge Elimination System (NPDES) permit.

The Plaintiffs also rely on other provisions of law for relief, including the Safe Drinking Water Act, 42 U.S.C. § 300, et seq., the Resources Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901, et seq., provisions of Ark. Stats. Ann. § 82-209, 220, the Arkansas Water and Air Pollution Control Act, the Arkansas Solid Waste Water Act, Ark. Stat. Ann. § 82-1901 and Ark. Stat. Ann § 82-2701, et seq., involving state permits issued pursuant to state and federal laws.

Furthermore, the plaintiffs seek tort action under common law of the State of Arkansas governing riparian rights, nuisance, constructive and inverse condemnation, declaratory judgment, injunctive relief, the imposition of civil penalties, compensatory and punitive damages, and attorneys fees and costs.

It is established that this court has jurisdiction over the issues involved under Section 505(a) of the Clean Water Act, 33 U.S.C. §§ 1365(a), 1365(a)(2) and 1365(e), and § 1370; 42 U.S.C. § 1983 and § 1985; 28 U.S.C. § 2201 and 28 U.S.C. § 1331. Venue in this case is appropriate in the Western District of Arkansas pursuant to 33 U.S.C. § 1365(c).

The plaintiffs in this action gave required notice of alleged violations on November 18, 1986, and that they intended to file suit. 33 U.S.C. § 1365(b)(1)(A), 42 U.S.C. § 6901, et seq., and 42 U.S.C. § 300, et seq.

Originally there were approximately 106 plaintiffs joined in the case, all of whom resided in Carroll County, Arkansas.

The defendant, City of Green Forest (the City), is a municipality located in Carroll County, Arkansas, and is, therefore, a political subdivision of the State of Arkansas; the City has owned and continues to own and manage a Publically Owned Treatment Works (POTW) which receives waste water effluent from the residents of the City and industrial waste water from the plant of the defendant, Tyson Foods, Inc., (Tyson) located in or near Green Forest, Arkansas. To meet the requirements of the Clean Water Act, 33 U.S.C. § 1365, the City obtained a NPDES permit to discharge pollutants from its POTW

into Dry Creek, thence to Long Creek in the White River basin. These discharges were and are discharges of pollutants into navigable waters as defined by § 1362 of the Act.

Originally the Arkansas Department of Pollution Control and Ecology and the United States Environmental Protection Agency were made defendants in the lawsuit on the basis that those agencies had failed to adequately enforce the Act as required. They were dismissed by the court on a showing of their respective efforts and actions as required by law.

The defendants timely answered the complaints of the plaintiffs and have vigorously opposed the contentions of plaintiffs seeking the relief as above alleged in the plaintiffs' complaint. The defendants have denied the allegations of the plaintiffs and have made special efforts to have the alleged charges against the defendants dismissed.

Substantial discovery has been accomplished by the parties in preparation for trial on the issues in the litigation. The court conducted pre-trial hearings and finally scheduled the case for trial commencing Tuesday, April 4, 1989. A jury was impanelled to consider and determine appropriate questions such as the common law tort claims of individual plaintiffs; the question of alleged violations of the Clean Water Act, including civil penalties; and request for injunctive relief. The trial of the case required six weeks and the testimony of numerous witnesses, including many of the plaintiffs, defendants, federal and state officers involved in the management of the pollution laws affecting the environment under which

people must live. Each of the parties presented expert witnesses. At the conclusion of a long and tedious trial, the court instructed the jury on the issues of law applicable for the jury's determination in the case. After the court instructed the jury on the issues involved, and counsel having presented their respective arguments to the jury, appropriate interrogatories were presented for the jury's consideration which the court determined the jury should decide. The jury deliberated on the issues presented to them for three days and returned their unanimous verdicts late afternoon of the third day.

First, the jury decided for the City on the question of discharging waste water into Dry Creek and returned a verdict in favor of the City as against the plaintiffs. Pursuant thereto, Judgment was entered on June 19, 1989, in favor of the defendant, City of Green Forest, Arkansas, and against the plaintiffs, Steve Work, et al.

On Interrogatory No. 2 the jury's verdict decided Tyson violated the Clean Water Act.

On Interrogatory No. 3 the jury decided that there were 43 separate occasions since November 16, 1981, that Tyson violated the Clean Water Act.

On Interrogatory No. 4 and final verdict by the jury awarded damages to 40 of the plaintiffs as named therein. The jury determined the damages to each for the plaintiffs as itemized damage to real property to each of the 40 plaintiffs and other compensatory damages. These verdicts were returned and filed with the court. By direction, the clerk entered judgment for each of the plaintiffs in accordance with the unanimous verdicts of the jury on June 19, 1989.

As the jury in its deliberations determined by their verdicts that Tyson was responsible for 43 violations, it becomes the duty and responsibility of this court to assess the penalty in accordance with the Clean Water Act, 33 U.S.C. § 1319(d), which provides:

> "Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $10,000 per day of such violation."

Under the provisions of the Act if a person is determined to be "in violation," it becomes the responsibility of the district court to decide the extent of the penalties as set out hereinabove. Thus, in the instant case the jury has decided unanimously that Tyson violated the terms of the Act and it becomes the duty of this court to assess civil penalties pursuant to Title 33 U.S.C. § 1319(d). *Tull v. United States*, 481 U.S. 412, 427.

Although there have been differences of opinion as to the interpretation of the opinion of the United States Supreme Court in the case of *Chesapeake Bay Founddation [sic] v. Gwaltney of Smithfield, Ltd.*, 611 F.Supp. 1542, this court is of the opinion that the opinions by the district court, Fourth Circuit Court of Appeals, and the Supreme Court, *supra*, together with the remand to the court of appeals, thence the return by remand to the district judge, provides a complete guide for this court in the

instant case. The district court, The Honorable Robert R. Merhige, Jr., in a thorough opinion set forth the applicable law in cases involving the Clean Water Act, 33 U.S.C. § 1365. The issues there are somewhat similar to the issues in the instant case. The Court explained that: "This suit is a citizen enforcement action – a 'citizen suit' – authorized by Section 505 of the Clean Water Act, 33 U.S.C. § 1365. . . . The violations reported in Gwaltney's DMRs form the basis of this action. Where a permittee is in violation of an NPDES discharge limitation, it is also 'in violation of . . . an effluent standard or limitation under [the Act],' 33 U.S.C. § 1365(a)(1), which makes the permittee subject to citizen suits. *Id.* For citizen suits under the Clean Water Act, Congress has authorized the district courts to assess appropriate civil penalties. 33 U.S.C. § 1365(a). Such penalties may be as high as '$10,000 per day of such violation.' 33 U.S.C. § 1365(d)."

Further, the court stated: "It is clear that, at least under the Clean Water Act, a citizen enforcer can only establish standing if it meets the requirements of 'injury in fact' set forth in *Sierra Club v. Morton*, 405 U.S. 727, 734-35, 92 S.Ct. 1361, 1366, 31 L.Ed.2d 635 (1972)." Continuing, the court held: "In addition to the ambiguity in the words 'to be in violation' standing alone, other portions of Section 1365 suggest that Gwaltney's proffered construction is not the only – or the most – plausible one. Section 1365 states that: "The district courts shall have jurisdiction . . . to apply any appropriate civil penalties under [33 U.S.C. § 1319(d)]."

"33 U.S.C. § 1365(a). Section 1319(d) authorizes civil penalties 'not to exceed $10,000 per day of . . . violation.' 33 U.S.C. § 1319(d).

Also, the district court in *Gwaltney* concluded that civil penalties should be assessed.

In discussing the legislative history of the Clean Water Act, the court concluded that the Act authorizes citizen suits based on unlawful conduct that "occurred in the past regardless of whether the conduct continues through the time the complaint is filed." This decision was based on the statement made by Senator Muskie, the manager in the Senate of the bill that added the citizen suit provision to the Act. Having reached such conclusion, the district court proceeded to impose penalties arising out of the problems with its biological treatment system and violations adduced from the chlorination waste. Penalties in the sum of $1,285,322 were assessed for such continuous violations.

In affirming the decision of the district court on the appeal, the Fourth Circuit Court of Appeals held that: (1) private "citizen suits" under the Clean Water Act could be based on past violations of the act; (2) each violation of monthly averages for discharge of pollutants amounted to a violation for each day of the month, for purposes of setting the maximum civil penalty; and (3) the district court did not abuse its discretion in setting the penalty.

To resolve conflicts in the Circuit Courts of Appeals, *see* 108 S.Ct. 380-81, the Supreme Court granted certiorari.

The case was regularly scheduled and argued October 5, 1987. The opinion of the Supreme Court was decided December 1, 1987, and delivered by Mr. Justice Marshall.

The Court held that § 505(a) of the Clean Water Act authorizes private citizens to commence a civil action for injunctive relief and/or the imposition of civil penalties in federal district court against any person "alleged to be in violation" of the conditions of a National Pollutant Discharge Elimination System (NPDES) permit. The court further determined that between 1981 and 1984, petitioner Gwaltney repeatedly violated the conditions of its NPDES permit by exceeding authorized effluent limitations. However, said the court, due to the installation of new equipment, petitioner's last reported violation occurred in May 1985. Nevertheless, in June 1984, having given notice of their intent to sue, as required by § 505(b) of the Act, respondents filed as § 505(a) suit alleging that the petitioner "has violated . . . [and] will continue to violate the NPDES permit."

The Supreme Court held, *inter alia*, that the Act's legislative history indicates that § 505 suits were intended to abate pollution and to enjoin continuous or intermittent violations, not to remedy 'wholly past violations.' "Our conclusion that § 505 does not permit citizen suits for wholly past violations does not necessarily dispose of this lawsuit, as both lower courts recognized." Continuing, "The District Court found persuasive the fact that '[respondents'] allegation in the complaint, that Gwaltney was continuing to violate its NPDES permit when plaintiffs filed suit[,] appears to have been made fully in good faith.' . . . Because we agree that § 505 confers jurisdiction over citizen suits when the citizen-plaintiffs make a good-faith allegation of continuous or intermittent violation, we remand the case to the Court of Appeals for further consideration."

Continuing, the Supreme Court stated that "Petitioner argues that citizen-plaintiffs must prove their allegations of ongoing noncompliance before jurisdiction attaches under § 505. . . . We cannot agree. The statute does not require that a defendant 'be in violation' of the Act at the commencement of suit; rather, the statute requires that a defendant be alleged to be in violation. . . . We agree with the Solicitor General that Congress's use of the phrase 'alleged to be in violation' reflects a conscious sensitivity to the practical difficulties of detecting and proving chronic episodic violations of environmental standards.'

Finally, "Because the court below erroneously concluded that respondents could maintain an action based on 'wholly past violations' of the Act, it declined to decide whether respondents' complaint contained a good-faith allegation of ongoing violation by petitioner. We therefore remand the case for consideration of this question."

On remand, the Fourth Circuit Court of Appeals held in a per curium opinion that "We remand to the district court for further findings as to whether, on the merits, plaintiffs proved at trial an ongoing violation. Citizen-plaintiffs may accomplish this either (1) by proving violations that continue on or after the date the complaint is filed, or (2) by adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations. Intermittent or sporadic violations do not cease to be ongoing until the date when there is no real likelihood of repetition. While the district court did make subsidiary findings pertinent to this issue, *see, e.g.*, 611 F.Supp. at 1549 n.

8, 1566 (Appendix A), it *did not* make a direct finding as to whether citizen-plaintiffs proved the existence of intermittent or sporadic violations constituting an ongoing violation."

The court went on to say "Consistent with the guidance of the Supreme Court majority and concurring opinions, the district court may wish to consider whether remedial actions were taken to cure violations, the *ex ante* probability that such remedial measures would be effective, and any other evidence presented during the proceedings that bears on whether the risk of defendant's continued violation had been completely eradicated when citizen-plaintiffs filed suit."

On receiving the remand in carrying out the direction of both the Supreme Court and the Fourth Circuit Court of Appeals, District Judge Merhige acknowledged that the Fourth Circuit Court provided considerable guidance for determining whether an ongoing violation has been shown. The court may find that an ongoing violation has been proved if at trial the plaintiffs either "(1) . . . prov[ed] violations that continue[d] on or after the date the complaint was filed, or (2) . . . adduc[ed] evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations." *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*, 844 F.2d 170, 171 (4th Cir. 1988) ("Remand Opinion").

Therefore, Judge Merhige concluded that "the mandate in this matter is clear and unequivocal: this court is to determine whether 'plaintiffs provided at trial an ongoing violation' as defined by the Fourth Circuit."

Further, he stated that "having found that the evidence adduced at trial shows a reasonable continuing likelihood of a recurrence of intermittent violations at the time the action was filed, the court finds that plaintiffs proved an ongoing violation. The original judgment of the Court imposing upon Gwaltney a total civil penalty of $1,285,322 shall be reinstated." *Chesapeake Bay Found. v. Gwaltney of Smithfield*, 688 F.Supp. 1078-80.

Therefore, the ultimate and final decision in the *Gwaltney* case resulted in a judgment of civil penalty as stated hereinabove.

After having heard, and having benefit of the entire record in the instant case, it is the opinion of this court that it parallels virtually to the point the result in the Gwaltney case, *supra*.

As an example, in the instant case the court submitted Interrogatory No. 2 to the jury as follows: Do you find from a preponderance of the evidence that the defendant. Tyson Foods, Inc., violated the Clean Water Act? The unanimous decision of the jury on the question was "Yes." Along with this interrogatory the court instructed the jury, No. 23, as follows: "If you find by a preponderance of the evidence that Tyson Foods, Inc., has violated the Clean Water Act by causing the City of Green Forest, Arkansas, to violate a provision of its Clean Water Act permit, you must determine the number of occasions on which Tyson has violated the Clean Water Act. In order to make this determination, you must determine how many violations by the City of its Clean Water Act permit were caused by Tyson"

In that the jury determined by its verdict, Interrogatory No. 2, that the defendant, Tyson Foods, Inc., violated the Clean Water Act, together with its response to Instruction No. 23, the jury determined that there were 43 violations within the period of time commencing with November 16, 1981. The jury having reached its decisions by the return of their verdicts that Defendant Tyson was responsible for Green Forest having violated the City's permit, it now becomes the responsibility of this court to determine the penalties that should be assessed for "such violations."

It is an established fact that Tyson Foods was involved in a number of pollution controversies commencing at least during the seventies. It is an established fact of record that Tyson Foods was a part of and committed ongoing violations of the Clean Water Act since well before March 1984. Tyson Foods has also been involved in litigation involving disposal of waste water under the laws of Arkansas. It is also an established fact that Tyson has been charged with ongoing violations of the Clean Water Act in a fairly recent decision. *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.*, 682 F.Supp. 1186 (N.D. Ala. 1988), two cases, where defendant's two commercial plants were involved in proceedings arising under the Federal Water Pollution Control Act as reported March 4, 1988.

A review of the plaintiff's second amended complaint makes it indelibly clear that the plaintiffs have made good-faith allegations of ongoing violations by Tyson. The citizen-plaintiffs in this case have alleged continuous or intermittent violations in an effort to establish a 'reasonable likelihood' that Tyson's utilization of

the facilities of Green Forest will repeat such violations. As already stated, Green Forest was and is operating under a permit from both EPA and the state agency.

It has been established by substantial testimony in the trial of this case of intermittent violations occurring before November 1985. The plaintiffs have alleged and have attempted to prove such violations to be ongoing until a date when there would be no likelihood of repetition. It is the opinion of the court that testimony at the trial was received by the court and jury that established at least some reasonable likelihood of a recurrence of intermittent violations by the defendants.

Defendant Tyson has strongly contended that a new facility of the defendant was undertaken and is now in place, operating to alleviate the previous violations at a cost in excess of a million dollars. The defendants insist that the flow of wastewater from its plant through the facility of Green Forest would prove and has already without question alleviated the previous violations.

Many witnesses on behalf of the plaintiffs have insisted that there have been intermittent and sporadic violations since the facility of Tyson became operational November 1985. In fact, it developed during the closing days of the trial that extensive oil and sludge occurred in Dry Creek which caused accusations by both parties. It is a fact that there was waste that occurred in Dry Creek which the plaintiffs said came from the Green Forest facility and the defendants claimed was an act brought on by the plaintiffs.

This court, having concluded that there was substantial evidence adduced at the trial establishing a reasonable likelihood of a recurrence of intermittent violations before and since November 1985 when Tyson's new treatment facility began operating, and that there was alleged good-faith allegations of the plaintiffs of ongoing violations and pursuant to the verdicts returned by the jury, now has the responsibility of to make a determination of reasonable penalties as required by 33 U.S.C. § 1365. This court has no hesitancy and concludes that the record clearly establishes good-faith allegations by the plaintiff as included in the complaint and the reasonable likelihood of repetition under the arrangements between Tyson and the City of intermittent and sporadic violations at some period in the alleviate the previous violations at a cost in excess of a million dollars. The defendants insist that the flow of wastewater from its plant through the facility of Green Forest would prove and has already without question alleviated the previous violations.

Many witnesses on behalf of the plaintiffs have insisted that there have been intermittent and sporadic violations since the facility of Tyson became operational November 1985. In fact, it developed during the closing days of the trial that extensive oil and sludge occurred in Dry Creek which caused accusations by both parties. It is a fact that there was waste that occurred in Dry Creek which the plaintiffs said came from the Green Forest facility and the defendants claimed was an act brought on by the plaintiffs.

This court, having concluded that there was substantial evidence adduced at the trial establishing a reasonable likelihood of a recurrence of intermittent violations

before and since November 1985 when Tyson's new treatment facility began operating, and that there was alleged good-faith allegations of the plaintiffs of ongoing violations and pursuant to the verdicts returned by the jury, now has the responsibility of to make a determination of reasonable penalties as required by 33 U.S.C. § 1365. This court has no hesitancy and concludes that the record clearly establishes good-faith allegations by the plaintiff as included in the complaint and the reasonable likelihood of repetition under the arrangements between Tyson and the City of intermittent and sporadic violations at some period in the future.

In consideration of civil penalties for the violations of the Clean Water Act as found by the jury, the court would first consider the testimony by both parties. In applying the facts as developed during the trial, the court should keep in mind the extent of violations as well as the number of violations through the years. As already noted, the jury concluded by its verdicts that there were 43 violations during the period of time applicable to this litigation. The court construes the decisions of the jury to be that there were violations on 43 separate days.

Obviously the court in consideration of assessing penalties in this case would give great weight to verdicts returned in the case by the jury on the questions submitted to the jury for their determination.

The attention of the court has been called to the policy by EPA in arriving at just and reasonable penalties under the statute. There are two documents containing the policy of EPA as noted: Policy on Civil Penalties and A Framework for Statute-Specific Approaches to Penalty

Assessments. The First document focuses on the general philosophies behind the penalty policy. The second document provides guidance to each program on how to develop medium-specific penalty policies. Additionally, there have been some recent cases in Arkansas wherein Consent Judgments were entered in settlements involving, *inter alia*, civil penalties. *United States v. City of Berryville*, Case No. 87-3010, Consent Decree as to Berryville entered October 1, 1987. Also, the court is pleased to have the recommendations of Honorable Anne Roberts Bobo, Attorney for the Arkansas Department of Pollution, Control & Ecology in amicus curiae brief submitted for the court's consideration.

Ability to pay and litigation considerations are included in the factors to be considered in arriving at a just and equitable decision.

In consideration of these factors, and the court having presided over the trial of the case, it is the opinion of the court that the maximum penalty for each violation that could be assessed in the case would be unnecessary. Applying the maximum under the Act would subject the defendant to civil penalties in the sum of $430,000.

It is the considered judgment of this court that a civil penalty of $1,000 for each of the 43 violations would be reasonable, just and equitable. Therefore, the court will enter a final judgment against the defendant, Tyson Foods, Inc., in the sum of $43,000 a total penalty for violations in accordance with the unanimous verdicts of the jury.

The court incorporates into this Memorandum Opinion its findings and conclusions pursuant to Rule 52 of the Federal Rules of Civil Procedure.

A judgment will be entered in accordance with this opinion.

DATED this 23rd day of August, 1989.

/s/ Oren Harris
UNITED STATES SENIOR
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HARRISON DIVISION

UNITED STATES OF AMERICA PLAINTIFF

v. No. 87-3069

CITY OF GREEN FOREST, ARKANSAS
and THE STATE OF ARKANSAS DEFENDANTS

CONSENT DECREE

(1) Plaintiff, the United States of America, on behalf of the United States Environmental Protection Agency ("EPA"), filed the complaint herein on September 28, 1987, alleging that the defendant, City of Green Forest, Arkansas, had violated, and was in violation of §§ 301 and 307 of the Clean Water Act, 33 U.S.C. §§ 1311 and 1317, various Administrative Orders, and the City's National Pollutant Discharge Elimination System ("NPDES") permit, Number AR0021741.

(2) The City of Green Forest is a political subdivision of the State of Arkansas and owns and operates a publicly owned treatment works (Green Fores "POTW") consisting of an existing treatment plant.

(3) The State of Arkansas has been joined as a defendant pursuant to § 309(e) of the Clean Water Act, 33 U.S.C. § 1319(e), and shall be liable for payment of any judgment, or any expenses incurred as a result of complying with any judgment, entered against the City to the extent that the laws of the state prevent the City from raising the revenues to comply with the consent decree.

(4) The United States of America, the City of Green Forest, and the State of Arkansas, each acting through its

respective attorneys, do hereby stipulate to the Court that, in order to resolve the issues stated in the United States' complaint, this consent decree should be entered.

NOW THEREFORE, it is hereby ordered, adjudged and decreed as follows:

I. JURISDICTION

(1) This Court has jurisdiction of the subject matter of this action and over the parties to this agreement pursuant to 28 U.S.C. §§ 1331 and 1345 and § 309 of the Clean Water Act (the "Act"), 33 U.S.C. § 1319. Venue is proper pursuant to § 309 of the Act, 33 U.S.C. § 1319.

(2) The complaint states claims upon which relief may be granted under § 309 of the Act, 33 U.S.C. § 1319.

II. PARTIES

The parties to this action are:

(1) Plaintiff, United States of America, on behalf of the Administrator of the United States Environmental Protection Agency ("EPA");

(2) Defendant, City of Green Forest ("Green Forest"), a political subdivision of the State of Arkansas;

(3) Defendant, State of Arkansas, joined as a party pursuant to § 309(e) of the Act, 33 U.S.C. § 1319(e).

III. BINDING EFFECT

(1) This consent decree shall apply to and be biding upon Green Forest, Arkansas, the State of Arkansas, and

the United States, and upon the officers, agents, trustees, servants, employees, successors, assigns, and attorneys of those parties, or any persons, firms or organizations, claiming by, through, or on behalf of any of the respective parties to this action. Green Forest shall give written notice of this consent decree to any successors in interest no later than 30 days prior to transfer of ownership, operation or other interest in Green Forest's POTW.

(2) Green Forest shall provide written instructions which conform to the terms of this consent decree to each and every contractor it may employ to assist in the implementation of the requirements of this decree. Upon transfer of ownership, operation, or other interest in Green Forest's POTW, Green Forest shall provide a copy of this decree to any successor in interest and to each contractor retained to perform any activity required by this decree. Green Forest shall condition the transfer of ownership, operation, other interest, or any contract related to the performance of the decree upon the successful execution of the terms and conditions of this decree. Green Forest shall notify in writing the United States Environmental Protection Agency, Region VI, the United States Attorney for the Western District of Arkansas, and the United States Department of Justice of any successor in interest at least 30 days prior to transfer.

IV. OBJECTIVES

All obligations described in this consent decree or resulting from the activities required by this decree shall have as their objective: causing the Green Forest POTW to be in compliance with its NPDES Permit Number

AR0021741 (the "Green Forest Permit") or renewal thereof, the Act, and the applicable Federal and State laws and regulations governing discharges from Green Forest's POTW.

V. DEFINITIONS

Unless otherwise defined herein, terms used in this Decree shall have the meaning given to those terms in the Clean Water Act, 33 U.S.C. § 1251 et seq., the regulations promulgated thereunder, *see* 33 U.S.C. § 1362, *see also* 33 C.F.R. § 401.11, and in any applicable NPDES permit.

VI. REMEDIAL MEASURES

Green Forest shall immediately comply with the terms of its NPDES permit, including the reporting and monitoring requirements, effluent limitations, and conditions governing the implementation of its pretreatment program.

VII. STIPULATED PENALTIES

The Permittee shall pay the following stipulated penalties for violations of its permit effluent limits during the terms of this consent decree:

For each violation of the thirty day average limitations for Biochemical Oxygen Demand, Total Suspended Solids, ammonia (NH_3N) or fecal coliform, whether the violations are loading, concentration, or reporting violations, Green Forest shall pay $500 per violation;

For any violation of the seven day limitations for Biochemical Oxygen Demand, Total Suspended Solids, fecal coliform, or ammonia (NH_3N), whether the violations are concentration or reporting violations, Green Forest shall pay $250 per violation;

For each violation of the limitations for minimum pH, maximum pH, or minimum dissolved oxygen, Green Forest shall pay $500 per violation.

The stipulated penalties herein shall be in addition to other remedies or sanctions available to the United States by reason of Green Forest' failure to comply with the requirements of this Decree, the NPDES Permit, or the Clean Water Act.

Any stipulated penalties incurred by Green Forest shall be paid by cashiers check payable to "Treasurer of the United States," and are to be tendered to the United states Attorney for the Western District of Arkansas, Harrison Division, by the 15th day of the month following the month in which the violations occurred, together with a letter describing the basis for the penalties. A copy of the letter and the check shall be sent to the United States and the U.S. Environmental Protection Agency, Region VI.

VIII. FORCE MAJEURE

1. If any event occurs which causes or may cause the City to violate any provision of this decree, the City shall notify the Court, the United States Attorney for the

Western District of Arkansas, the Assistant Attorney General, Land and Natural Resources Division of the Department of Justice, and EPA Region VI, in writing within twenty days of such event, describing in detail the anticipated length of the violation, the precise cause or causes of the violation, the measures taken or to be taken by the City to prevent or minimize the violation, and the timetable by which those measures will be implemented. The City shall promptly adopt all reasonable measures to prevent or minimize any such violations and to comply with all requirements of this decree as soon as possible. Failure by the City to comply with the notice requirements of this paragraph shall render paragraphs VIII 2, 3 and 4 void and of no effect as to the particular incident involved.

2. If the United States agrees that the violation has been or will be caused entirely by circumstances beyond the control of the City or any entity controlled by or under the common control of the City, including the City's consultants and contractors, and that the City could not have reasonably foreseen and prevented such violation, then the time for performance hereunder upon timely request, as set forth in paragraph 1 above and pursuant to the procedures set forth in paragraphs VII 1, 3 and 4 shall be extended for a period no longer than the actual delay resulting from such circumstances, and stipulated penalties shall not be due for said delay.

3. In the event the United States does not so agree, Green Forest may submit the matter to the Court for resolution pursuant to Section XII of this decree. The United states [sic] shall notify the City in writing of the United States agreement or disagreement with the City's

claim of a delay or impediment to performance within 45 days of receipt of the City's notice under paragraph 1 of this section. If the City submits the matter to the Court for resolution and the Court determines that the violation was caused entirely by circumstances beyond the control of the City or any entity controlled by the City, including the City's consultants and contractors, the City shall be excused as to that violation, but only for the period of time the violation continues due to such circumstances.

4. Unanticipated or increased costs or expenses associated with the implementation of this decree, changed financial circumstances, or technical unfeasibility of meeting NPDES effluent limitations shall not, in any event, serve as a basis for changes in this decree or extensions of time under this decree.

5. Compliance with any requirement of this decree by itself, shall not constitute compliance with any other requirement. An extension of one compliance date based on a particular incident does not necessarily result in an extension of a subsequent compliance date or dates. The City must make an individual showing of proof regarding each delayed incremental step or other requirement for which an extension is sought.

6. The City shall bear the burden of proving that any delay or violation of any requirement of this Consent Decree was caused entirely by circumstances beyond the control of the City or any entity controlled by the City, including the City's consultants and contractors. The City shall also bear the burden of proving the duration and extent of any delay or violation attributable to such circumstances.

IX. DISPUTE RESOLUTION

1. If the parties are unable to agree upon any plan, procedure, standard, requirement or other matter described herein, or in the event a dispute should arise among the parties regarding the implementation of the requirements of this decree, the parties shall follow the position of the United States unless the defendant files a petition with the Court for resolution of the dispute within thirty (30) days after receiving the United States' final decision on the disputed matter. The petition shall set out the nature of the dispute with a proposal for its resolution.

2. The United States shall have 30 days to file a response with an alternate proposal for resolution. In any such dispute, the defendant shall have the burden of proving that the United States' proposal is arbitrary and capricious and not in accord with the objections of this decree, and that the City's proposal most appropriately fulfills the terms, conditions, requirements, and objectives of this decree, the NPDES permit and the Act.

X. ENTRY AND INSPECTION

During the term of this consent decree the Administrator of the EPA or his/her authorized representatives, contractors, consultants and attorneys shall have authority to enter the City's facilities at reasonable times for purposes of:

(1) Monitoring the progress of activities required by this decree;

(2) Verifying any data or information submitted to EPA in accordance with the terms of the decree;

(3) Obtaining samples, and, upon request, splits of any samples taken by Green Forest or its consultants; and

(4) Assessing Green Forest's compliance with this decree.

XI. RETENTION OF JURISDICTION

The Court shall retain jurisdiction to enforce the terms and conditions of this Consent Decree, consistent with the objectives of this decree and to resolve all disputes arising hereunder as may be necessary or appropriate for the construction or execution of this Consent Decree.

XII. STATUTORY PENALTIES

1. Within 60 days of the entry of this Consent Decree, Green Forest shall pay a civil penalty of Fifteen Thousand Dollars ($15,000) for past violations of the Act reported to EPA pursuant to the requirements of the Green Forest Permit through the date of lodging of the decree, and of violations alleged in the complaint. This payment is in complete satisfaction of the civil liability of Green Forest pursuant to Section 309 for violations of §§ 301 and 307 of the Act, 33 U.S.C. §§ 1311 and 1317, and the Green Forest NPDES permit.

2. Payment shall be made by certified or cashiers check within 60 days after the date of entry of this decree, payable to the "Treasuerer of the United States," and

delivered to the office of the Untied States Attorney for the Western District of Arkansas, P.O. Box 1524, Fort Smith, Arkansas, with a copy mailed to the Regional Administration, EPA Region VI, 1445 Ross Avenue, Dallas, Texas 75202-2733, and to the Assistant Attorney General, Land and Natural Resources Division, U.S. Department of Justice, 10th Street and Pennsylvania Avenue, N.W., Washington, D.C. 20530. Such payment shall not be deductible for federal taxation purposes.

XIII. FUNDING

Performance of the terms of this Consent Decree by Green Forest is neither conditioned upon receipt of, nor excused by the lack of, any federal or state grant monies. In addition, Green Forest's performance is not excused by the failure to obtain or shortfall of any federal or state grant funds, or by the processing of any applications for the same.

XIV. COSTS OF ACTION

Each part shall bear its own cost of this action and attorney's fees, except as otherwise provided herein.

XV. PERMIT REMAINS UNMODIFIED

1. This consent decree is not, and shall not be interpreted to be a permit, or a modification of an existing permit for the discharge of pollutants under § 402 of the Act, 33 U.S.C. § 1342, nor shall it in any way relieve Green Forest of any obligation imposed by the Act or any permit issued thereunder, or of its obligation to comply

with any other local, state, or federal law in any way related to the subject of this Consent Decree. Nothing contained herein shall be construed to prevent or limit the United States' rights to obtain penalties or injunctive relief under the Act or other federal statutes or regulations except as expressly specified herein.

2. The United States does not, by its consent to the entry of this decree, warrant or aver in any manner that the City's comp'_te compliance with this decree or any portions thereof, will result in compliance with the provisions of the Act or the City's NPDES permit. Notwithstanding EPA's review of any plans, manuals, or reports, the City shall remain solely responsible for compliance with the terms of this decree and of its NPDES permit.

3. The parties agree that the City is responsible for achieving and maintaining complete compliance with all applicable federal and state laws, regulations, and permits.

4. The United States reserves any and all legal and equitable remedies available to enforce the provisions of this decree.

XVI. COSTS OF SUIT

Should Green Forest subsequently be determined to have violated the terms and conditions of this decree, then Green Forest shall be liable to the United States for any costs and attorney's fees incurred by the United States in any Court actions against Green Forest for noncompliance with this decree.

XVII. CONTINGENT LIABILITY OF STATE OF ARKANSAS

This decree does not resolve the contingent liability of the State of Arkansas under § 309(e) of the Act, 33 U.S.C. § 1319(e). The United States specifically reserves its claims against the State, and the State reserves its defenses.

XVIII. FORM OF NOTICE

Except as specified otherwise, when written notification to or communication with the United States, EPA Region VI, Defendant, or the State is required by the terms of this Consent Decree, it shall be addressed as follows:

As to the United States:

Chief, Environmental Enforcement Section
Land and Natural Resources Division
U.S. Department of Justice
Post Office Box 7611
Ben Franklin Station
Washington, D.C. 20044

Reference Case No. 90-5-1-1-2841

As to EPA Region:

Enforcement Branch
Compliance Section
Water Division
U.S. Environmental Protection Agency – Region VI

As to the State:

Arnold M. Jochums, Office of the Attorney General
State of Arkansas, Tower Building, Suite 200
4th & Center Streets
Little Rock, Arkansas 72201

As to Defendant:

City of Green Forest, Arkansas
P.O. Box 240
Green Forest, Arkansas 72638

Notifications to or communications with EPA or the United States shall be deemed submitted on the date they are postmarked and sent by certified mail, return receipt requested.

IXX. [sic] MODIFICATION

Except as provided for herein, there shall be no modification of this Consent Decree without written approval of all of the parties to this Consent Decree and the Court.

XX. PUBLIC COMMENT

The parties agree and acknowledge that final approval by the United States and entry of this Decree is subject to the requirements of 28 C.F.R. § 50.7 which provides for notice of the lodging of this Consent Decree in the Federal Register, an opportunity for public comment, and consideration of any comments.

XXI. CONTINUING JURISDICTION OF THE COURT

The Court shall retain jurisdiction to enforce the terms and conditions of this decree and to resolve disputes arising hereunder as may be necessary or appropriate for the construction or execution of this decree.

XXII. TERMINATION

This decree will terminate with respect to Green Forest when the United States notifies the Court that the City has maintained compliance with its permit at the Green Forest plant for six consecutive months beginning on the – date that this decree is signed by the City.

Date and entered this 24th day of March, 1989.

/s/ Oren Harris
UNITED STATES DISTRICT JUDGE

WE HEREBY CONSENT to the entry of this decree subject to the public notice requirements of 28 C.F.R. § 50.7.

FOR THE UNITED STATES:

DATE: 1-17-89

/s/ Donald Carr
Donald Carr
Acting Assistant Attorney General
Land and Natural Resources Division
United States Department of Justice
(FILED MAR 29 1989)

DATE: _____

/s/ Thomas L. Adams, Jr.
THOMAS L. ADAMS, JR.
Assistant Administrator
For Enforcement and Compliance Monitoring,
United States Environmental Protection Agency

J. MICHAEL FITZHUGH
United States Attorney for the Western
District of Arkansas

DATE: November 22, 1988

/s/ William M. Cromwell
Assistant United States
Attorney

FOR THE CITY OF GREEN
FOREST:

DATE: November 22, 1988

/s/ Causauer G. Clark
Attorney for the City of Green
Forest

DATE: November 8, 1988

/s/ Billy F. Johnson
Mayor, City of Green Forest

FOR THE STATE OF ARKANSAS:

DATE: November 21, 1988

/s/ Steve Clark

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HARRISON DIVISION

UNITED STATES OF AMERICA, PLAINTIFF,	)	
VS.	)	NO. 87-3069
CITY OF GREEN FOREST, ARKANSAS, and STATE OF ARKANSAS, DEFENDANTS.	)	

ORDER

Before the Court is a motion for intervention and objection to proposed consent decree filed by Steve Work and others. Prospective intervenors are plaintiffs in another lawsuit, *Steve Work, et al. v. Tyson Foods, Inc., et al.*, Civil No. 87-2034, Western District of Arkansas, Fort Smith Division. Both that lawsuit and this one involve problems experienced with the publically [sic] owned treatment works (POTW) in the City of Green Forest, Arkansas (the City).

The United States Environmental Protection Agency (USEPA) and the City have proposed to settle this lawsuit pursuant to the terms of a consent decree, which was published in the *Federal Register* in February, 1989. Interested parties have thirty days from the date of publication in which to file objections to the decree, as prospective intervenors have done here.

Prospective intervenors object to the proposed consent decree and seek to intervene on a number of grounds. The primary bases for intervention involved alleged deficiencies in enforcement and penalty provisions of the proposed

decree. The Court has reviewed the rather extensive record in this matter, including the proposed consent decree, and is of the opinion that prospective intervenors' motion is not well taken and should be denied.

The provisions of the consent decree that prospective intervenors object to involve discretionary duties of the Administrator of the USEPA. *See Dubois v. Thomas*, 820 F.2d 943 (8th Cir. 1987). The Court has jurisdiction only in respect to alleged violations of mandatory duties of the Administrator. In matters, such as this one, involving discretionary duties, the Court lack subject matter jurisdiction to hear prospective intervenors' objections. The USEPA and the City have entered into an agreement to resolve the problems which exist with the Green Forest POTW, and the Court will not disturb the terms of the consent decree.

IT IS THEREFORE CONSIDERED, ORDERED, AND ADJUDGED that the motion for intervention and objection to proposed consent decree be and the same is hereby denied.

Dated this 22nd day of March, 1989.

/s/ Oren Harris
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

STEVE WORK, et al., PLAINTIFFS,	)	
VS.	)	NO. 87-2034
TYSON FOODS, INC., and THE CITY OF GREEN FOREST, ARKANSAS, DEFENDANTS.	)	

ORDER

(Filed April 12, 1988)

Before the Court is a motion for partial summary judgment filed by defendant City of Green Forest (the City), pertaining to allegations in plaintiffs' complaint of violations of the Clean Water Act on the part of the City.

Plaintiffs filed this citizens action pursuant to 33 U.S.C. § 1365, on March 3, 1987. On September 28, 1987, the United States, at the request of the Administrator of the Environmental Protection Agency (EPA), filed suit against the City, seeking injunctive relief and civil penalties for alleged violations of a National Pollutant Discharge Elimination System permit issued to the City in accordance with EPA regulations. That case was styled as *United States v. City of Green Forest, Arkansas*, No. 87-3096, Western District of Arkansas, Harrison Division.

The Court entered a consent decree in *Green Forest* on March 24, 1989. The decree set forth penalties against the City and otherwise resolved the government's lawsuit

against the City. The City now argues that because plaintiffs are seeking the same relief obtained by the government in *Green Forest*, plaintiffs' allegations of violations of the Clean Water Act by the City are barred by res judicata and collateral estoppel.

The Court agrees. The citizen suit provision of the Clean Water Act is meant to supplement rather than supplant governmental action. See *Gwaltney v. Chesapeake Bay Foundation*, ___ U.S. ___, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987). Here, both the EPA and the Arkansas Department of Pollution Control and Ecology sought to bring the City into compliance with its permit limits over a period of years by means of administrative orders. Finally, the government brought a lawsuit against the City, albeit after plaintiffs filed their action, and the government obtained a judgment against the City by means of a consent decree. Because issues raised against the City under the Clean Water Act have been resolved, plaintiffs are barred from raising the same issues here.

Accordingly, the Court finds that the City's motion is well taken and must be granted.

IT IS THEREFORE CONSIDERED, ORDERED, AND ADJUDGED that the motion for partial summary judgment filed by defendant city of Green Forest pertaining to Clean Water Act issues be and the same is hereby granted.

IT IS FURTHER ORDERED that plaintiffs' complaint, insofar as it contains allegations of violations of the Clean Water Act on the part of the City, be and the same is hereby dismissed with prejudice.

Dated this 12th day of April, 1989.

/s/ Oren Harris
UNITED STATES DISTRICT JUDGE

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

Nos. 89-1661/2549/2636/90-1011/1041WA

Lewis Stephen Work, et al., Appellants/cross-appellees,	*	
	*	Order Denying
	*	Petition for
v.	*	Rehearing
	*	with
The City of Green Forest, Arkansas, et al.,	*	Suggestion
	*	for Rehearing
Appellees/cross-appellants.	*	En Banc

Suggestion for rehearing en banc from appellees/cross-appellants Tyson Foods, et al., has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petitions for rehearing by the panel from appellant/cross-appellees Stephen Work, et al., and by appellees/cross-appellants Tyson Foods, et al., are also denied.

February 14, 1991

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain

Clerk, U. S. Court of Appeals, Eighth Circuit

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

Nos. 89-1661/2549/2636/90-1011/1041WA

Lewis Stephen Work, et al.,	* Appeals
Appellants/cross-appellees,	* from the
	* United
v.	* States
	* District
The City of Green Forest, Arkansas, et al.,	* Court
	* for the
Appellees/cross-appellants.	* Western
	* District of
	* Arkansas

Appellants/cross-appellees' motion for clarification or reconsideration for the court's order on fees and costs has been considered by the court and is hereby denied.

March 27, 1991

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit

ENVIRONMENTAL PROTECTION AGENCY

REGION VI
1402 ELM STREET, 3RD FLOOR
DALLAS, TEXAS 75202

Honorable A. L. Powell
Mayor, City of Green Forest
Green Forest, Arkansas 72638

Through: Arkansas Department of Pollution Control and Ecology

Re: WPC-ARK-265

Dear Mayor Powell:

The plans and specifications of your wastewater facilities project have been approved provided that you comply with the following requirements:

1. A statement must be added to the specifications indicating that the method of awarding the contract will be to the responsible bidder submitting the lowest acceptable bid.

2. In Item 53, "Open Specifications" of the General Conditions, the statements regarding "equal" materials and equipment must be modified to indicate that approved equals will be acceptable for all items.

3. Contract Section I and Contract Section II must be modified to indicate that approved equals will be acceptable where brand name equipment is specified.

4. The gravity plant bypass must be eliminated. Unit bypassing must be modified to assure primary settling and chlorination at all times.

5. The City's Industrial Waste Ordinance must be amended to limit BOD discharges to a maximum of

400mg/.l and suspended solids to a maximum of 302mg/l as indicated in the design criteria submitted with the plans and specifications. Furthermore, in order to maintain the design capacity allotted for the City's projected population potential, the total BOD discharge from industrial waste sources must be limited to 3730 pounds per day.

All of the above requirements have been discussed by telephone with Mr. Carl Yates. Mr. Yates also indicated that tests for BOD and Suspended Solids would be preformed to ascertain the present strength of the industrial sewage flows.

One set of the plans and specifications has been sent to you under separate cover. You should make them available at the construction site for use of the contractor and state and federal personnel making inspections.

This will confirm our telephone conversation of August 4, 1971, with Mr. Yates authorizing you to advertise for and open bids on this project provided that all conditions of the grant offer and contract requirements can be met. Please review our Instructions for Advertising and Bidding, CG-147.

You must provide a project identification sign according to the construction specifications which we sent to you and erect it at a prominent location adjacent to U.S. Highway 62.

You must submit completed Part B forms to us through the Texas Water Quality Board immediately after bids are opened. We are enclosing these forms, instructions for preparation, and a sample site certificate.

Reorganization Plan No. 3 of 1970 established the Environmental Protection Agency. All reference to the Department of the Interior and the Secretary in the enclosed documents shall be deemed to be reference to the Environmental Protection Agency and the Administrator of the Environmental Protection Agency.

Sincerely,

Joe L. Haney, P.E.
Air and Water Programs Division

Enclosures
cc:
Ark. Dept. of Pollution Control and Ecology
McGoodwin, Williams & Yates, Inc.

October 28, 1977

CERTIFIED MAIL - RETURN RECEIPT REQUESTED (758661)

Honorable T. E. Larimer
Mayor of Green Forest
Post Office Box 215
Green Forest, Arkansas 72638

RE NPDES Permit No. AR0021741

Dear Mayor Larimer:

Under a memorandum of agreement with the Environmental Protective Agency, this Department will draft the above referenced permit.

The NPDES permit issued for your facility under Section 402 of the Federal Water Pollution Control Act (PL 92-500) expired on May 1, 1977. Section 301 of the Act requires that effluent limitations for all publicly owned treatment works in operation after July 1, 1977 be based on secondary treatment or more stringent limitations if required to meet water quality standards.

The sewage treatment plant covered by the NPDES permit cited above did not produce an effluent meeting these requirements by July 1, 1977. The Administrator of the Environmental Protection Agency has determined that permits for such facilities be reissued for the more stringent limitations required by PL 92-500, accompanied by an Enforcement Compliance Schedule Letter (ECSL). This ECSL acknowledges that the permittee did not comply with these limitations by July 1, 1977, and requires that the permittee agree to a specific schedule of construction to comply with these limitations in the shortest possible time.

The time durations reflected in Attachment II are purposely abbreviated. This Department will recommend that a stipulation be imposed in Part III of the permit which will require the City of Green Forest to negotiate a Schedule of Compliance with Franz Foods, Incorporated, for adequate pre-treatment facilities to comply with Section 307(b)(1) of PL 92-500. This additional requirement will be timed to coincide with the construction grants process as closely as practicable but shall in no case allow Franz Foods, Incorporated to extend its present level of pretreatment beyond July 1, 1980.

We are enclosing a sample copy of the ECSL for your review and comment. Please send your comments to us within two weeks. The "official" ECSL, which will require your signature to indicate acceptance of the compliance schedule, will be accompanied by the permit proposed for reissuance for your facility. This package will be sent subsequent to receipt of your comments.

If you have any questions, please contact the undersigned.

Sincerely,

Robert E. Blanz, Ph.D.
Engineer
Division of Water Pollution Control

REB/em

Enclosure

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

P. O. Box 1198, Ada, Oklahoma 74820

Date: April 19, 1979

SUBJECT: Transmittal Memo – NPDES Compliance Monitoring Inspection Report

FROM: Chief, Ada Branch (6ASAA)

TO: 6ASA

An NPDES sampling inspection was conducted at the following:

Name: Waste Water Treatment Facility
Permit No. AR0021741
City: Green Forest, Arkansas
Inspector: Clarence A. Edmonson
Chemist, Ada Branch

Any apparent violations are described in the attached Compliance Inspection Report. As a result of this inspection, a Notice of Deficiency was issued to this facility (given to Mr. Jewell Wise).

Inspector's recommendations and personal comments are as follows:

The city needs an administrative order to force compliance with the permit's general condition 1-d. This could prevent an increased flow into an already overloaded plant. Tyson Foods, a poultry processing plant, is planning to increase production by over 60 percent. The increase is scheduled to be handled by adding an old floatation device (unused at another Tyson plant), which is intended to aid in solids removal. However, the BOD is too high for adequate waste treatment.

The waste water plant at present does not meet the permitted BOD limits; therefore, any increase in production would put the plant further out of compliance. The treatment plant as operating could easily meet a 20-20 criteria for BOD and TSS if the poultry plant waste was not allowed in the system. Also, the company is obtaining an unfair advantage over other poultry processors by not having to treat their waste. The city will not force the industry to comply with industrial pretreatment regulations as they fear financial and political reprisal. Therefore, an administrative order is the minimum effort which should be considered.

/s/ Clarence A. Edmonson
Clarence A. Edmonson,
Chemist
Ada Branch

Attachments

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

AUG 04 1980

CERTIFIED MAIL: RETURN RECEIPT REQUESTED
(168638)

Honorable James R. Eldridge
Mayor of Green Forest
P. O. Box 215
Green Forest, Arkansas 72638

Re: NPDES Permit No. AR0021741

Dear Mayor Eldridge:

Your facility is violating the referenced permit as follows:

Final effluent limitations for BOD5, TSS, and fecal coliform, required by Special Condition 1b on page 5 of your permit, were not met during the period January through June 1980.

These violations are subject to enforcement action as provided for by the Clean Water Act. You must take action to eliminate and prevent the recurrence of the violations noted above.

We will place a report of these violations in your file and will use this information to determine the appropriate action to take in the event of future violations.

We are especially concerned regarding the massive increase in BOD5 over last year. During the period March through June 1979 the 30-day average BOD5 ranged from 53 to 70 mg/l. During the period March through June 1980, however, the 30-day average BOD5 ranged from 231 to 344 mg/l. The concentrations are higher than domestic raw sewage! How do you account for this large increase

in BOD5 and what will you do now to correct this situation? You may find it necessary to require a much higher level of pretreatment for industrial wastes discharged to the city sewerage system, for example. Please send us your response within 30 days.

If you have any questions on this matter, please contact Mr. S. C. Leonard, P.E., at the above address or telephone (214) 767-4375.

Sincerely,

Robert E. Hanneschlager, Acting Chief
Municipal Section (6AEWM)

Bcc: Stender (6AEPC)
Gazda (6ASASC)
Leonard (6AEWM)

6AEWM:LEONARD:bjs:72765:AE-45A
B-VI WLF0214SL2:8-1-80

cc: Arkansas Department of Pollution Control and Ecology

Tyson Foods, Inc.
2210 OAKLAWN • DRAWER E •SPRINGDALE,
ARKANSAS 72764 • (501) 756-4000

May 19, 1987

Dr. Ben M. Saultzman
Director
Arkansas Department of Health
4815 W. Markham
Little Rock, AR 72205-3867

Dear Ben:

In reference to your letter concerning the sludge disposal from the Green Forest plant, the last thing in the world we want to do is to get into a turf battle between the Arkansas Department of Health and The Pollution Control Commission.

In addition to that as you undoubtedly know, we employ more people in Green Forest than live in the city, but a substantial part of our work force are people in the city. We certainly would not want to cause any problem with the public drinking water.

At this point as we understand it, Pollution Control has given us permission to spread the sludge where we are spreading it. Anderson Spring is not contaminated and you are merely asking us voluntarily (1) to quit spreading sludge in a 90 square mile area that includes the Chaney Farm which you have no actual authority to do, and (2) to run our site applications by your department which admittedly has no authority to pass on them before we take them to Pollution Control.

A problem with this is the time span of review which has already been a problem with Pollution Control and a turf battle that seems to be going on already between the Soil

Conservation and the Pollution Control, who apparently has quit accepting the Soil Conservation Service findings just as your department has quit accepting the Pollution Control Department findings.

It seems to me that it is time to have a major meeting in the Governor's office with the Governor's staff and get the turf problems ironed out so that the delays that cause us so much trouble now can be eliminated. I am by copy of this letter advising the Governor's Chief of Staff that we would be more than happy to attend a peace settlement between the agencies meeting.

It might be that Soil Conservation, the State Health Department and Pollution Control could all agree once a year on one expert whose findings they would accept and avoid needless duplication for industry where the state agencies will not accept each other's findings.

Perhaps we could get by with less state employees.

My understanding is that we are going to at this point transfer some of the Green Forest work load to our Texas and Alabama plants so that we can voluntarily quit spreading on the Chaney farm to show our good faith, even though we have a legal permit to do that, and even though we cannot find any authority that your department has to request us not to do it.

You understand (1) that time is money and (2) that if we voluntarily accept your agency's unauthorized review in future matters we have no legal rules applying to either the process or the appeal process.

Please let us know if the idea of a meeting of all involved agencies in the Governor's office is acceptable to you.

I notice you copied the Attorney General – we would be glad to have him there also.

Best personal regards,

/s/ James B. Blair
James B. Blair
General Counsel

JBB/lws

cc: Betsy Wright
Office of the Governor

Phyliss Moore
Pollution Control & Ecology

Jeff Storey
Attorney General's Office

Mayor Bill Johnson
Green Forest

Mike Mashburn
Mashburn & Taylor

Larry Ward
Bill Moeller

§ 1319. Enforcement [FWPCA § 309]

(a) State enforcement; compliance orders

(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title in a permit issued by a State under an approved permit program under section 1342 or 1344 of this title he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of permit conditions or limitations as set forth in paragraph (1) of this subsection are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such conditions and limitations (hereafter referred to in this section as the period of "federally assumed enforcement"), except where an extension has

been granted under paragraph (5)(B) of this subsection, the Administrator shall enforce any permit condition or limitation with respect to any person –

(A) by issuing an order to comply with such condition or limitation, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by him or by a State or in a permit issued under section 1344 of this title by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

(4) A copy of any order issued under this subsection shall be sent immediately by the Administrator to the State in which the violation occurs and other affected States. In any case in which an order under this subsection (or notice to a violator under paragraph (1) of this subsection) is issued to a corporation, a copy of such order (or notice) shall be served on any appropriate corporate officers. An order issued under this subsection relating to a violation of section 1318 of this title shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation.

(5)(A) Any order issued under this subsection shall be by personal service, shall state with reasonable specificity the nature of the violation, and shall specify a time for compliance not to exceed thirty days in the case of a violation of an interim compliance schedule or operation and maintenance requirement and not to exceed a time the Administrator determines to be reasonable in the case of a violation of a final deadline, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

(B) The Administrator may, if he determines (i) that any person who is a violator of, or any person who is otherwise not in compliance with, the time requirements under this chapter or in any permit issued under this chapter, has acted in good faith, and has made a commitment (in the form of contracts or other securities) of necessary resources to achieve compliance by the earliest possible date after July 1, 1977, but not later than April 1, 1979; (ii) that any extension under this provision will not result in the imposition of any additional controls on any other point or nonpoint source; (iii) that an application for a permit under section 1342 of this title was filed for such person prior to December 31, 1974; and (iv) that the facilities necessary for compliance with such requirements are under construction, grant an extension of the date referred to in section 1311(b)(1)(A) of this title to a date which will achieve compliance at the earliest time possible but not later than April 1, 1979.

(6) Whenever, on the basis of information available to him, the Administrator finds (A) that any person is in violation of section 1311(b)(1)(A) or (C) of this title, (B) that such person cannot meet the requirements for a time

extension under section 1311(i)(2) of this title, and (C) that the most expeditious and appropriate means of compliance with this chapter by such person is to discharge into a publicly owned treatment works, then, upon request of such person, the Administrator may issue an order requiring such person to comply with this chapter at the earliest date practicable, but not later than July 1, 1983, by discharging into a publicly owned treatment works if such works concur with such order. Such order shall include a schedule of compliance.

(b) Civil actions

The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

(c) Criminal penalties

(1) Negligent violations

Any person who –

(A) negligently violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit

issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in any permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

(2) Knowing violations

Any person who –

(A) knowingly violates section 1311, 1312, 1316, 1317, 1318, 1321(B)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement

imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) knowingly introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in a permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

(3) Knowing endangerment

(A) General rule

Any person who knowingly violates section 1311, 1312, 1313, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State, and who

knows at that time that he thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a fine of not more than $250,000 or imprisonment of not more than 15 years, or both. A person which is an organization shall, upon conviction of violating this subparagraph, be subject to a fine of not more than $1,000,000. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, the maximum punishment shall be doubled with respect to both fine and imprisonment.

(B) Additional provisions

For the purpose of subparagraph (a) of this paragraph –

(i) in determining whether a defendant who is an individual knew that his conduct placed another person in imminent danger of death or serious bodily injury –

(I) the person is responsible only for actual awareness or actual belief that he possessed; and

(II) knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant;

except that in proving the defendant's possession of actual knowledge, circumstantial evidence may be used, including evidence that the defendant took affirmative steps to shield himself from relevant information;

(ii) it is an affirmative defense to prosecution that the conduct charged was consented to by the person endangered and

that the danger and conduct charged were reasonably foreseeable hazards of –

(I) an occupation, a business, or a profession; or

(II) medical treatment or medical or scientific experimentation conducted by professionally approved methods and such other person had been made aware of the risks involved prior to giving consent;

and such defense may be established under this subparagraph by a preponderance of the evidence;

(iii) the term "organization" means a legal entity, other than a government, established or organized for any purpose, and such term includes a corporation, company, association, firm, partnership, joint stock company, foundation, institution, trust, society, union, or any other association of persons; and

(iv) the term "serious bodily injury" means bodily injury which involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(4) False statements

Any person who knowingly makes any false material statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who knowingly falsifies, tampers with, or renders inaccurate any monitoring device or method required to be

maintained under this chapter, shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than 2 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $20,000 per day of violation, or by imprisonment of not more than 4 years, or by both.

(5) Treatment of single operational upset

For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(6) Responsible corporate officer as "person"

For the purpose of this subsection, the term "person" means, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.

(7) Hazardous substance defined

For the purpose of this subsection, the term "hazardous substance" means (A) any substance designated pursuant to section 1321(b)(2)(A) of this title, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of Title 42, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C.A. § 6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act [42 U.S.C.A. § 6901 et seq.] has been suspended by Act of Congress), (D) any toxic pollutant listed under section 1317(a) of this title, and (E) any imminently hazardous chemical substance or mixture

with respect to which the Administrator has taken action pursuant to section 2606 of Title 15.

(d) Civil penalties; factors considered in determining amount

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State,,[1] or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(e) State liability for judgments and expenses

Whenever a municipality is a party to a civil action brought by the United States under this section, the State in which such municipality is located shall be joined as a

party. Such State shall be liable for payment of any judgment, or any expenses incurred as a result of complying with any judgment, entered against the municipality in such action to the extent that the laws of that State prevent the municipality from raising revenues needed to comply with such judgment.

(f) Wrongful introduction of pollutants into treatments works

Whenever, on the basis of any information available to him, the Administrator finds that an owner or operator of any source is introducing a pollutant into a treatment works in violation of subsection (d) of section 1317 of this title, the Administrator may notify the owner or operator of such treatment works and the State of such violation. If the owner or operator of the treatment works does not commence appropriate enforcement action within 30 days of the date of such notification, the Administrator may commence a civil action for appropriate relief, including but not limited to, a permanent or temporary injunction, against the owner or operator of such treatment works. In any such civil action the Administrator shall join the owner or operator of such source as a party to the action. Such action shall be brought in the district court of the United States in the district in which the treatment works is located. Such court shall have jurisdiction to restrain such violation and to require the owner or operator of the treatment works and the owner or operator of the source to take such action as may be necessary to come into compliance with this chapter. Notice of commencement of any such action shall be given to the State. Nothing in this subsection shall be construed to limit or prohibit any

other authority the Administrator may have under this chapter.

(g) Administrative penalties

(1) Violations

Whenever on the basis of any information available –

(A) the Administrator finds that any person has violated section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or has violated any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or in a permit issued under section 1344 of this title by a State, or

(B) the Secretary of the Army (hereinafter in this subsection referred to as the "Secretary") finds that any person has violated any permit condition or limitation in a permit issued under section 1344 of this title by the Secretary,

the Administrator or Secretary, as the case may be, may, after consultation with the State in which the violation occurs, assess a class I civil penalty or a class II civil penalty under this subsection.

(2) Classes of penalties

(A) Class I

The amount of a class I civil penalty under paragraph (1) may not exceed $10,000 per violation, except that the maximum amount of any class I civil penalty under this subparagraph shall not exceed $25,000. Before issuing an order

assessing a civil penalty under this subparagraph, the Administrator or the Secretary, as the case may be, shall give to the person to be assessed such penalty written notice of the Administrator's or Secretary's proposal to issue such order and the opportunity to request, within 30 days of the date the notice is received by such person, a hearing on the proposed order. Such hearing shall not be subject to section 554 or 556 of Title 5, but shall provide a reasonable opportunity to be heard and to present evidence.

(B) Class II

The amount of a class II civil penalty under paragraph (1) may not exceed $10,000 per day for each day during which the violation continues; except that the maximum amount of any class II civil penalty under this suparagraph shall not exceed $125,000. Except as otherwise provided in this subsection, a class II civil penalty shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected after notice and opportunity for a hearing on the record in accordance with section 554 of Title 5. The Administrator and the Secretary may issue rules for discovery procedures for hearings under this subparagraph.

(3) Determining amount

In determining the amount of any penalty assessed under this subsection, the Administrator or the Secretary, as the case may be, shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if

any) resulting from the violation, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

(4) Rights of interest persons

(A) Public notice

Before issuing an order assessing a civil penalty under this subsection the Administrator or Secretary, as the case may be, shall provide public notice of and reasonable opportunity to comment on the proposed issuance of such order.

(B) Presentation of evidence

Any person who comments on a proposed assessment of a penalty under this subsection shall be given notice of any hearing held under this subsection and of the order assessing such penalty. In any hearing held under this subsection, such person shall have a reasonable opportunity to be heard and to present evidence.

(C) Rights of interested persons to a hearing

If no hearing is held under paragraph (2) before issuance of an order assessing a penalty under this subsection, any person who commented on the proposed assessment may petition, within 30 days after the issuance of such order, the Administrator or Secretary, as the case may be, to set aside such order and to provide a hearing on the penalty. If the evidence presented by the petitioner in support of the petition is material and was not considered in the

issuance of the order, the Administrator or Secretary shall immediately set aside such order and provide a hearing in accordance with paragraph (2)(A) in the case of a class I civil penalty and paragraph (2)(B) in the case of a class II civil penalty. If the Administrator or Secretary denies a hearing under this subparagraph, the Administrator or Secretary shall provide to the petitioner, and publish in the Federal Register, notice of and the reasons for such denial.

(5) Finality of order

An order issued under this subsection shall become final 30 days after its issuance unless a petition for judicial review is filed under paragraph (8) or a hearing is requested under paragraph (4)(C). If such a hearing is denied, such order shall become final 30 days after such denial.

(6) Effect of order

(A) Limitation on actions under other sections

Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this chapter; except that any violation –

(i) with respect to which the Administrator or the Secretary has commenced and is diligently prosecuting an action under this subsection,

(ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or

(iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be,

shall not be the subject of a civil penalty action under subsection (d) of this section or section 1321(b) of this title or section 1365 of this title.

(B) Applicability of limitation with respect to citizen suits

The limitations contained in subparagraph (A) on civil penalty actions under section 1365 of this title shall not apply with respect to any violation for which –

(i) a civil action under section 1365(a)(1) of this title has been filed prior to commencement of an action under this subsection, or

(ii) notice of an alleged violation of section 1365(a)(1) of this title has been given in accordance with section 1365(b)(1)(A) of this title prior to commencement of an action under this subsection and an action under section 1365(a)(1) of this title with respect to such alleged violation if filed before the 120th day after the date on which such notice is given.

(7) Effect of action on compliance

No action by the Administrator or the Secretary under this subsection shall affect any person's obligation to comply with any section of this chapter or with the terms and conditions of any permit issued pursuant to section 1342 or 1344 of this title.

(8) Judicial review

Any person against whom a civil penalty is assessed under this subsection or who commented on the proposed assessment of such penalty in accordance with paragraph (4) may obtain review of such assessment –

(A) in the case of assessment of a class I civil penalty, in the United States District Court for the District of Columbia or in the district in which the violation is alleged to have occurred, or

(B) in the case of assessment of a class II civil penalty, in United States Court of Appeals for the District of Columbia Circuit or for any other circuit in which such person resides or transacts business,

by filing a notice of appeal in such court within the 30-day period beginning on the date the civil penalty order is issued and by simultaneously sending a copy of such notice by certified mail to the Administrator or the Secretary, as the case may be, and the Attorney General. The Administrator or the Secretary shall promptly file in such court a certified copy of the record on which the order was issued. Such court shall not set aside or remand such order unless there is not substantial evidence in the record, taken as a whole, to support the finding of a violation or unless the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion and shall not impose additional civil penalties for the same violation unless the Administrator's or Secretary's assessment of the penalty constitutes an abuse of discretion.

(9) Collection

If any person fails to pay an assessment of a civil penalty –

(A) after the order making the assessment has become final, or

(B) after a court in an action brought under paragraph (8) has entered a final judgment in favor of the Administrator or the Secretary, as the case may be,

the Administrator or the Secretary shall request the Attorney General to bring a civil action in an appropriate district court to recover the amount assessed (plus interest at currently prevailing rates from the date of the final order or the date of the final judgment, as the case may be). In such an action, the validity, amount, and appropriateness of such penalty shall not be subject to review. Any person who fails to pay on a timely basis the amount of an assessment of a civil penalty as described in the first sentence of this paragraph shall be required to pay, in addition to such amount and interest, attorneys fees and costs for collection proceedings and a quarterly nonpayment penalty for each quarter during which such failure to pay persists. Such nonpayment penalty shall be in an amount equal to 20 percent of the aggregate amount of such person's penalties and nonpayment penalties which are unpaid as of the beginning of such quarter.

(10) Subpoenas

The Administrator or Secretary, as the case may be, may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, or documents in connection with hearings under this subsection. In case of contumacy or refusal to obey a subpoena issued pursuant to this paragraph and served upon any person, the district court of the United States for any district in which such person is found, resides, or transacts business, upon application by the United States and after notice

to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the administrative law judge or to appear and produce documents before the administrative law judge, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(11) Protection of existing procedures

Nothing in this subsection shall change the procedures existing on the day before February 4, 1987, under other subsections of this section for issuance and enforcement of orders by the Administrator.

§ 1342. National pollutant discharge elimination system [FWPCA § 402]

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked,

modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objectives of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters

within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which–

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

(c) Suspension of Federal program upon submission of State program; withdrawal of approval of State program; return of State program to Administrator

(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 1314(i)(2) of this title. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 1314(i)(2) of this title.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(4) Limitations on partial permit program returns and withdrawals. –

A State may return to the Administrator administration, and the Administrator may withdraw under paragraph (3) of this subsection approval, of –

(A) a State partial permit program approved under subsection (n)(3) of this section only if the entire permit program being administered by the State department or agency at the time is returned or withdrawn; and

(B) a State partial permit program approved under subsection (n)(4) of this section only if an entire phased component of the permit program being administered by the State at the time is returned or withdrawn.

(d) Notification of Administrator

(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and

requirements of this chapter. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) In any case where, after December 27, 1977, the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this chapter.

(e) Waiver of notification requirement

In accordance with guidelines promulgated pursuant to subsection (i)(2) of section 1314 of this title, the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

(f) Point source categories

The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

(g) Other regulations for safe transportation, handling, carriage, storage, and stowage of pollutants

Any permit issued under this section for the discharge of pollutants into the navigable waters from a vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

(h) Violation of permit conditions; restriction or prohibition upon introduction of pollutant by source not previously utilizing treatment works

In the event any condition of a permit for discharges from a treatment works (as defined in section 1292 of this title) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved or where the Administrator determines pursuant to section 1319(a) of this title that a State with an approved program has not commenced appropriate enforcement

action with respect to such permit, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such conditions as violated.

(i) Federal enforcement not limited

Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

(j) Public information

A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

(k) Compliance with permits

Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 1311, 1316, or 1342 of this title, or (2) section 407 of this title, unless

the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on October 18, 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date which source is not subject to section 407 of this title, the discharge by such source shall not be a violation of this chapter if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

(l) Limitation on permit requirement

(1) Agricultural return flows

The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.

(2) Stormwater runoff from oil, gas, and mining operations

The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to require a permit, for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches,

and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

(m) Additional pretreatment of conventional pollutants not required

To the extent a treatment works (as defined in section 1292 of this title) which is publicly owned is not meeting the requirements of a permit issued under this section for such treatment works as a result of inadequate design or operation of such treatment works, the Administrator, in issuing a permit under this section, shall not require pretreatment by a person introducing conventional pollutants identified pursuant to section 1314(a)(4) of this title into such treatment works other than pretreatment required to assure compliance with pretreatment standards under subsection (b)(8) of this section and section 1317(b)(1) of this title. Nothing in this subsection shall affect the Administrator's authority under sections 1317 and 1319 of this title, affect State and local authority under sections 1317(b)(4) and 1370 of this title, relieve such treatment works of its obligations to meet requirements established under this chapter, or otherwise preclude such works from pursuing whatever feasible options are available to meet its responsibility to comply with its permit under this section.

(n) Partial permit program

(1) State submission

The Governor of a State may submit under subsection (b) of this section a permit program for a portion of the discharges into the navigable waters in such State.

(2) Minimum coverage

A partial permit program under this subsection shall cover, at a minimum, administration of a major category of the discharges into the navigable waters of the State or a major component of the permit program required by subsection (b) of this section.

(3) Approval of major category partial permit programs

The Administrator may approve a partial permit program covering administration of a major category of discharges under this subsection if –

(A) such program represents a complete permit program and covers all of the discharges under the jurisdiction of a department or agency of the State; and

(B) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b) of this section.

(4) Approval of major component partial permit programs

The Administrator may approve under this subsection a partial and phased permit program

covering administration of a major component (including discharge categories) of a State permit program required by subsection (b) of this section if –

(A) the Administrator determines that the partial program represents a significant and identifiable part of the State program required by subsection (b) of this section; and

(B) the State submits, and the Administrator approves, a plan for the State to assume administration by phases of the remainder of the State program required by subsection (b) of this section by a specified date not more than 5 years after submission of the partial program under this subsection and agrees to make all reasonable efforts to assume such administration by such date.

(o) Anti-backsliding

(1) General prohibition

In the case of effluent limitations established on the basis of subsection (a)(1)(B) of this section, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 1314(b) of this title subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit. In the case of effluent limitations established on the basis of section 1311(b)(1)(C) or section 1313(d) or (e) of this title, a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section 1313(d)(4) of this title.

(2) Exceptions

A permit with respect to which paragraph (1) applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant if –

(A) material and substantial alterations of additions to the permitted facility occurred after permit issuance which justify the application of a less stringent effluent limitation;

(B)(i) information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or

(ii) the Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under subsection (a)(1)(B) of this section;

(C) a less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;

(D) the permittee has received a permit modification under section 1311(c), 1311(g), 1311(h), 1311(i), 1311(k), 1311(n), or 1326(a) of this title; or

(E) the permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent

than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification).

Subparagraph (B) shall not apply to any revised waste load allocations or any alternative grounds for translating water quality standards into effluent limitations, except where the cumulative effect of such revised allocations results in a decrease in the amount of pollutants discharged into the concerned waters, and such revised allocations are not the result of a discharger eliminating or substantially reducing its discharge of pollutants due to complying with the requirements of this chapter or for reasons otherwise unrelated to water quality.

(3) Limitations

In no event may a permit with respect to which paragraph (1) applies be renewed, reissued, or modified to contain an effluent limitation which is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, reissued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 1313 of this title applicable to such waters.

(p) Municipal and industrial stormwater discharges

(1) General rule

Prior to October 1, 1992, the Administrator or the State (in the case of a permit program approved under this section) shall not require a permit under this section for discharges composed entirely of stormwater.

(2) Exceptions

Paragraph (1) shall not apply with respect to the following stormwater discharges:

(A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.

(B) A discharge associated with industrial activity.

(C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.

(D) A discharge from a municipal separate storm sewer system serving a population of 100,000 or more but less than 250,000.

(E) A discharge for which the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

(3) Permit requirements

(A) Industrial discharges

Permits for discharges associated with industrial activity shall meet all applicable provisions of this section and section 1311 of this title.

(B) Municipal discharge

Permits for discharges from municipal storm sewers –

(i) may be issued on a system-wide or jurisdiction-wide basis;

(ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and

(iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

(4) Permit application requirements

(A) Industrial and large municipal discharges

Not later than 2 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraphs (2)(B) and (2)(C). Applications for permits for such discharges shall be filed no later than 3 years after February 4, 1987. Not later than 4 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(B) Other municipal discharges

Not later than 4 years after February 4, 1987, the Administrator shall establish regulations setting forth the permit application requirements for stormwater discharges described in paragraph (2)(D). Applications for permits for such discharges shall be filed no later than 5 years after February 4, 1987. Not

later than 6 years after February 4, 1987, the Administrator or the State, as the case may be, shall issue or deny each such permit. Any such permit shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit.

(5) Studies

The Administrator, in consultation with the States, shall conduct a study for the purposes of –

(A) identifying those stormwater discharges or classes of stormwater discharges for which permits are not required pursuant to paragraphs (1) and (2) of this subsection;

(B) determining, to the maximum extent practicable, the nature and extent of pollutants in such discharges; and

(C) establishing procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.

Not later than October 1, 1988, the Administrator shall submit to Congress a report on the results of the study described in subparagraphs (A) and (B). Not later than October 1, 1989, the Administrator shall submit to Congress a report on the results of the study described in subparagraph (C).

(6) Regulations

Not later than October 1, 1992, the Administrator, in consultation with State and local officials, shall issue regulations (based on the

results of the studies conducted under paragraph (5)) which designate stormwater discharges, other than those discharges described in paragraph (2), to be regulated to protect water quality and shall establish a comprehensive program to regulate such designated sources. The program shall, at a minimum, (A) establish priorities, (B) establish requirements for State stormwater management programs, and (C) establish expeditious deadlines. The program may include performance standards, guidelines, guidance, and management practices and treatment requirements, as appropriate.

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§ 1365. Citizen suits [FWPCA § 505]

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf –

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) Notice

No action may be commenced –

(1) under subsection (a)(1) of this section –

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in

which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention by Administrator; United States interests protected

(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(3) Protection of interests of United States

Whenever any action is brought under this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General and the Administrator. No consent judgment shall be entered in an action in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator.

(d) Litigation costs

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Statutory or common law rights not restricted

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

(f) Effluent standard or limitation

For purposes of this section, the term "effluent standard or limitation under this chapter" means (1) effective

July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title; (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of this title; (6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title); or (7) a regulation under section 1345(d) of this title,.[1]

(g) Citizen

For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

(h) Civil action by State Governors

A Governor of a State may commence a civil action under subsection (a) of this section, without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this chapter the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State.

AMENDMENT 7

Trial by jury in civil cases.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Supreme Court, U.S.
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(2)

90-1768

No. 90-1774

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LEWIS STEPHEN WORK, ET AL.,

Petitioners,

vs.

TYSON FOODS, INC., ET AL.

Respondents.

Petition for Writ of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

WHETHER THE LOWER COURTS CORRECTLY GAVE RES JUDICATA EFFECT TO THE CONSENT DECREE ENTERED IN THE COMPANION EPA ACTION.

II.

WHETHER THIS COURT MUST REVIEW THE PENALTY ASSESSED AGAINST RESPONDENT.

III.

WHETHER THE EIGHTH CIRCUIT'S ORDER REGARDING COSTS AND FEES PRESENTS A QUESTION WORTHY OF THIS COURT'S REVIEW.

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OPINIONS BELOW

The opinion of the Eighth Circuit is reported as *EPA v. City of Green Forest*, 921 F.2d 1394 (8th Cir. 1990), and the opinion of the trial court is reported as *Work v. Tyson Foods, Inc.*, 720 F. Supp. 132 (W.D.Ark. 1989), *rev'd in part sub nom. EPA v. City of Green Forest*, 921 F.2d 1394 (8th Cir. 1990). Both, along with certain unreported orders, also appear in the appendix to the petition.

JURISDICTION

This Court's jurisdiction is properly invoked pursuant to 28 U.S.C. § 1254(1). The petition appears to respondent to have been timely filed.

CONSTITUTIONAL PROVISIONS AND STATUTES

This brief contains citations to the seventh amendment, U.S. Const. amend. VII, and to two sections of the Clean Water Act, 33 U.S.C. § 1319 and 33 U.S.C. § 1365, all of which are set out in the appendix to the petition.

STATEMENT OF THE CASE

Although petitioners' statement of the case contains more information than necessary, respondent generally agrees with petitioners' description of the proceedings below. In two particulars, however, that statement of the case is misleading.

First, petitioners state on page 9 that "in May 1989, the POTW was again upset and Dry Creek was polluted." The record, however, includes no evidence that the city exceeded the parameters in its NPDES permit — for any potential pollutant — at any time after respondent's new treatment plant began operations in 1985.

Second, petitioners indicate that the Eighth Circuit's reversal of the trial court's denial of a recovery for property damage runs against both respondent and the city. Petition at 10. In reality, except for the claim of one petitioner, the Eighth Circuit reversed on this point only in connection with the inverse condemnation damages petitioners sought from the city. *EPA v. City of Green Forest*, 921 F.2d 1394, 1410, 1412 (8th Cir. 1990).

SUMMARY OF ARGUMENT

The Eighth Circuit correctly gave res judicata effect to the consent judgment entered in the companion EPA action, since the cases involve the same questions and petitioners are in privity with the EPA. There is no conflict among the circuits on this issue.

Nothing in the seventh amendment suggests that it was improper for the trial judge to set the penalty after the jury found liability. Further, since petitioners failed to make a seventh amendment argument below, they should not be permitted to raise it here.

The Eighth Circuit was within its discretion in ordering each party to bear its own fees on appeal. The Clean Water Act requires an award of fees only when appropriate and not as a matter of routine. As petitioners failed in part to comply with the Federal Rules of Appellate Procedure, the denial of fees was reasonable.

ARGUMENT

I. THE LOWER COURTS CORRECTLY GAVE RES JUDICATA EFFECT TO THE CONSENT DECREE ENTERED IN THE COMPANION EPA ACTION

Virtually all the authorities upon which petitioners[1] rely address the propriety of dismissing a citizen suit upon the later filing of a governmental enforcement action. The controlling question in each such case was whether the government filed its separate action during the statutory notice period. Those concerns are not implicated here because this case involves the preclusive effect of a final judgment.

Res judicata takes no account of whether the first of two companion actions to reach judgment was the first filed. *See, e.g., Insurance Co. v. Harris*, 97 U.S. 331, 336 (1878). The relevant inquiry is instead whether the matters at issue were the same in both cases and then whether the first judgment was rendered by a court having jurisdiction. If so, "irrespective of which action or proceeding was first brought, it is the first final judgment rendered . . . which becomes conclusive." *Chicago, R.I. & P. Ry. Co. v. Schendel*, 270 U.S. 611, 616-17 (1926) (citations omitted). Further, a consent judgment which determines the facts and the law is treated like any other judgment for res judicata purposes. *United States v. International Bldg. Co.*, 345 U.S. 502, 506 (1953). Thus, the decree entered in the EPA action necessarily concluded the matters at issue here. Both cases involved the city's inability to comply with its NPDES permit; the EPA consent decree was therefore binding on the district court.

Even if this action and the EPA case are not otherwise sufficiently similar to trigger the application of res judicata (which respondent does not concede), petitioners stand here

[1] Petitioners are individuals; respondent is a corporation having only wholly owned subsidiaries.

in the shoes of the EPA. 33 U.S.C. § 1365(b)(1). They are therefore bound by the decision rendered in its action, for the rights of those in privity with a party to another action will be affected by any decision rendered there. *Cf. Chase Nat'l Bank v. Norwalk*, 291 U.S. 431, 441 (1934) (rights of one not a party or privy unaffected by prior judgment).

Petitioners' contention that the consent decree should not have been held to bind them because they were "nonconsenting parties" is likewise of no merit. They may not rely on such cases as *Martin v. Wilks*, 490 U.S. 755 (1989), for the simple reason that the EPA, in settling its own action, acted on behalf of all aggrieved citizens, petitioners included.

Finally, there is no conflict among the circuits on this issue. All but one of the cases petitioners cite on this point, *Chesapeake Bay Found. v. American Recovery Co., Inc.*, 769 F.2d 207 (4th Cir. 1985), was decided by a district court, and *American Recovery* is not in any sense in conflict with the Eighth Circuit's decision here.[2] Until the other circuits actually rule on these issues, no conflict among them can exist and a grant of certiorari would be premature.

II. THIS COURT NEED NOT REVIEW THE PENALTY ASSESSED AGAINST RESPONDENT

Petitioners apparently believe that the seventh amendment requires the jury, not the judge, to set the penalties in a CWA action. This Court made clear in *Tull v. United States*, 481 U.S. 412 (1987), however, that Congress's delegation of the penalty calculation to the trial judge does not contravene the seventh amendment. The ultimate determination of both the severity of the violation for which liability might be

[2] Contrary to petitioners' suggestion, the *American Recovery* court did not approve the settlement simply because the plaintiffs endorsed it. Instead, it independently assessed the facts and concluded that the defendant had taken the actions necessary to abate the offending activity. *See id.* at 209.

imposed and the appropriate amount of the penalty is committed to the sound discretion of the trial court, not to the jury. *Tull*, 481 U.S. at 426-27.

Petitioners were entitled to a jury trial in the liability phase of this action, but "the trial court and not the jury should determine the amount of penalty, if any." *Id.* at 427. The Act commanded the trial judge to exercise independent judgment before imposing any penalty; he was therefore required to act on his discretion in setting the penalty. *Id.* at 425; *see also* 33 U.S.C. § 1319(d) (judge to consider, among other factors, those "justice may require").

Even assuming that this exercise of discretion required the trial court to construe the jury verdict, that is no violation of the seventh amendment. As this Court recognized in *Tull*, the early English practice, to which the seventh amendment traces its roots, would have sanctioned imposition of a penalty set by the legislature (or by its delegate, the trial judge), and not by the jury. *Id.* at 426.

Petitioners also complain that the penalty assessed against respondent amounts to only a small percentage of the maximum permissible and infer that the trial court must therefore have failed to consider the relevant factors. The district court's opinion indicates, however, that it took note of the factors enumerated in the CWA.[3] *See Work v. Tyson Foods, Inc.*, 720 F.Supp. 132, 138-39 (W.D.Ark. 1989), *rev'd in part sub nom. EPA v. City of Green Forest*, 921 F.2d 1394 (8th Cir. 1990).

Since the Act required the trial judge to consider such other factors as he thought relevant to a just result, his penalty

[3] Despite their references to the EPA Penalty Policy, even petitioners, by their citation of *Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128 (11th Cir. 1990), acknowledge that "the court's primary focus should be on the statutory language of § 1319(d)." *id.* at 1142.

award of $43,000 may well have been influenced by the evidence that respondent paid the city some $642,000 in treatment surcharges before upgrading its pretreatment plant, that upgrading the plant cost it an additional $1.3 million, and that, at the city's request, respondent created a substantial number of new jobs at its Green Forest operation in order to help the city qualify for an Arkansas Industrial Development Commission grant to construct a new water system. In short, whatever amount petitioners assert respondent saved, the evidence showed that it also expended substantial sums.

Finally, since petitioners failed to make a seventh amendment argument below, this Court should not grant the writ to consider the seventh amendment claims they raise here.

III. THE EIGHTH CIRCUIT'S ORDER REGARDING COSTS AND FEES DOES NOT PRESENT A QUESTION WORTHY OF REVIEW

Petitioners advanced five points for reversal on CWA grounds below. The Eighth Circuit, however, affirmed the CWA portion of the district court's judgment, remanding only to allow petitioners to seek attorney's fees from Green Forest, and denying petitioners' application for fees on appeal. Far from being arbitrary, this was a reasonable and appropriate exercise of discretion. The remand demonstrates that the appellate court was sensitive to the concerns underlying the fee-shifting statute.

The CWA provides only that the court "may" award reasonable attorney fees, whenever it determines such an award is "appropriate." 33 U.S.C. § 1365(d). Here, the Eighth Circuit alone is aware of the extent to which the efforts of each party contributed to efficient resolution of the issues on

appeal.[4] Petitioners have suggested no convincing reason for this Court to examine its denial of fees.

The CWA, unlike the Civil Rights Attorney's Fees Awards Act, does not require that a prevailing party recover attorney's fees unless special circumstances dictate otherwise.[5] *Natural Resources Defense Council, Inc. v. Thomas*, 801 F.2d 457 (D.C. Cir. 1986). The civil rights fee shifting provision, which requires an award of fees, "is not textually similar to § 505(d) [§ 1365(d)], since it does not provide for awards where 'appropriate,' but states that the court 'may allow the prevailing party . . . a reasonable attorney's fee.'" *Id.* at 461 n.3 (Scalia, J.). In any event, petitioners achieved their limited success on the CWA claims in the trial court, where they already have the opportunity to seek fees.

Finally, the Eighth Circuit's order directing each party to bear its own fees is unlikely to influence later litigation under the Act; it is unreported.

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[4] Such concerns may underlie the denial of fees. At oral argument, for example, a member of the panel chided petitioners for submitting a virtually useless appendix. Rule 30(d) of the Federal Rules of Appellate Procedure required petitioners to present the relevant portions of the record in an orderly appendix. Their three-volume, 1,142 page document was not, however, arranged in chronological order and did not even include an index until respondent requested that the court direct them to prepare and file one.

[5] Petitioners' suggestion that all federal fee-shifting statutes are to be interpreted *pari passu* misconstrues this Court's observation in *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 682 n.1 (1983), that all those statutes which provide for an award of attorney's fees when "appropriate" are to be construed similarly.

CONCLUSION

Since the petition raises no question worthy of review, the writ should not issue.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1990

LEWIS STEPHEN WORK, et al.,

Petitioners,

vs.

TYSON FOODS, INC.; CITY OF GREEN FOREST, ARKANSAS; and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

A.

WHETHER A CITIZEN SUIT BROUGHT UNDER 33 U.S.C. § 1365 CAN BE PRECLUDED BY THE ENTRY OF A CONSENT DECREE BETWEEN THE EPA AND AN ALLEGED POLLUTER IN AN ACTION INITIATED BY THE EPA AFTER THE CITIZEN SUIT WAS FILED.

B.

WHETHER AN APPELLATE COURT CAN DENY ATTORNEY'S FEES AND COSTS INCURRED ON APPEAL BY CITIZEN PLAINTIFFS IN A SUIT BROUGHT PURSUANT TO THE CLEAN WATER ACT.

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STATEMENT OF THE CASE

On March 3, 1987, approximately 100 residents of an area east of the small town of Green Forest, Arkansas filed suit in the United States District Court for the Western District of Arkansas against Tyson Foods, Inc., the City of Green Forest, and 18 other defendants, seeking relief under the Clean Water Act, 33 U.S.C. § 1251, et seq., as well as under a number of other federal and state statutes and the common law of the State of Arkansas. The plaintiffs, petitioners here, alleged that their groundwater was polluted as a result of Tyson Foods' discharge into the City's publicly owned treatment works (POTW) of greater quantities of waste than the POTW was capable of handling. The plaintiffs sought declaratory and injunctive relief, the imposition of civil penalties, compensatory and punitive damages and attorney's fees.

On September 28, 1987, the United States of America, at the request of the Environmental Protection Agency (EPA), filed suit in the same court against the City of Green Forest and the State of Arkansas pursuant to the Clean Water Act. The government also sought injunctive relief and the assessment of civil penalties against the City of Green Forest for its discharge of pollutants in violation of the Act.

On January 28, 1989, the government lodged a proposed consent decree settling its enforcement action. Notice of the lodging of the proposed decree was published in the Federal Register on February 21, 1989. On March 17, 1989, the plaintiffs filed a motion seeking to intervene in the EPA action and setting forth their objections to the proposed consent decree. In an order entered

on March 24, 1989, the district court denied the motion for intervention. The consent decree was subsequently approved by the court and filed on March 29, 1989.

Before trial commenced in the citizen suit, the City of Green Forest filed a motion for partial summary judgment, seeking dismissal of the plaintiffs' Clean Water Act claims on the basis of collateral estoppel and res judicata. Agreeing with the City's position that the plaintiffs were seeking the same relief for the same alleged violations of the Clean Water Act as had been sought by the EPA in the government enforcement action and that resolution of those issues by entry of the consent decree barred the plaintiffs from proceeding with their Clean Water Act claims, the district court granted the City's motion and dismissed with prejudice that portion of the complaint seeking relief against the City under the Clean Water Act. The plaintiffs were permitted to proceed against the City on all other claims stated in the complaint, although the case went to the jury (as against the City) only on the plaintiffs' claim for damages based upon inverse condemnation. The jury returned a verdict in favor of the City on the inverse condemnation claims.

The plaintiffs appealed to the United States Court of Appeals for the Eighth Circuit. As against the City, the plaintiffs argued, first, that the trial court erred in denying intervention in and consolidation with the EPA action; second, that the district court erred in granting partial summary judgment in favor of the City on the Clean Water Act claims; and third, that the inverse condemnation claim was submitted to the jury under improper instructions. In an opinion filed December 18, 1990, the Eighth Circuit Court of Appeals held that the

lower court properly denied the motion to consolidate. It also found that the district court correctly dismissed the citizens' Clean Water Act claims on grounds of res judicata. The appellate court further held that the trial court erred in denying the plaintiffs' motion to intervene in the government enforcement action, but found the error harmless except to the extent that the ruling prevented the plaintiffs from seeking attorneys' fees. Thus, the Court of Appeals remanded the case in order to allow the plaintiffs to attempt to recover fees. The Court of Appeals also reversed and remanded on the plaintiffs' inverse condemnation claims, finding that the trial court submitted that theory to the jury under erroneous instructions.

Both the citizen-plaintiffs and Tyson Foods, Inc. have petitioned this Court for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit. Tyson's petition raises Clean Water Act issues which do not affect the City and, thus, the City makes no response to Tyson's petition. The plaintiffs present three questions for review, but only the first and the third of those three questions call for a response by the City.

ARGUMENT

A.

WHETHER A CITIZEN SUIT BROUGHT UNDER 33 U.S.C. § 1365 CAN BE PRECLUDED BY THE ENTRY OF A CONSENT DECREE BETWEEN THE EPA AND AN ALLEGED POLLUTER IN AN ACTION INITIATED BY THE EPA AFTER THE CITIZEN SUIT WAS FILED.

On September 28, 1987, the EPA filed suit in the United States District Court for the Western District of

Arkansas against the City of Green Forest. The action was brought pursuant to the Clean Water Act, 33 U.S.C. § 1319, and sought injunctive relief and civil penalties, alleging violation of the NPDES permit issued by the EPA to the City of Green Forest. The United States of America sought the same relief for the same alleged violations of the Clean Water Act that the petitioners were seeking in a suit they had filed against the City (and others) on March 3, 1987. On March 29, 1989, a consent decree was entered in the EPA action filed against the City. The City then filed a motion for partial summary judgment in the plaintiffs' suit, seeking dismissal of the plaintiffs' Clean Water Act claims against the City on the basis of collateral estoppel and res judicata. The trial court granted the City's motion and dismissed with prejudice that portion of the complaint seeking relief under the Clean Water Act. The plaintiffs were allowed to proceed against the City on all other claims stated in the complaint. On appeal, the Eighth Circuit Court of Appeals held that the trial court properly dismissed the Clean Water Act claims against the City on grounds of res judicata.

The petitioners now ask this Court to review the question whether the entry of a consent decree in a Clean Water Act case commenced by the EPA subsequent to the filing of a citizen suit under that Act may have a res judicata effect on the citizen suit. In their brief, the petitioners focus on the role which they contend a citizen may take when the government fails to act within the sixty day period after notice of intent to sue is given pursuant to 33 U.S.C. § 1365(b). The petitioners maintain that under the Eighth Circuit's ruling, citizen suits would

be barred from proceeding whenever the EPA subsequently commences and settles an enforcement action. The City submits that the petitioners misconceive the role which citizens are to play under the enforcement mechanism of the Clean Water Act and, further, misread the scope of the appellate court's ruling.

As the Eighth Circuit noted in its opinion, the Clean Water Act is intended to be enforced primarily by the United States government. Thus, in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), this Court stated:

> The bar on citizen suits when governmental enforcement action is underway suggests that the citizen suit is meant to supplement rather than to supplant governmental action. The legislative history of the Act reinforces this view of the role of the citizen suit.
>
> 484 U. S. at 60.

In *Gwaltney*, this Court held that to permit citizen suits for wholly past violations of the Act "could undermine the supplementary role envisioned for the citizen suit." 484 U.S. at 60.

The United States District Court for the Southern District of New York's well-spoken comments in *Hudson River Fishermen's Association v. County of Westchester*, 686 F. Supp. 1044 (S.D. N.Y. 1988) amplify the reasons for delegating to private citizens a secondary, rather than a primary, role. Responding to the Fishermen's Association's argument that dismissal of its suit would leave the group without a remedy, the Court declared:

> We are particularly unimpressed with this latter argument. The thrust of the CWA is to

> provide *society* with a remedy against polluters in the interest of protecting the environment. Section 101 of the CWA, 33 U.S.C. § 1251(a). If the Government's action achieves that end, the fact that HudFish or any other private attorney general is barred from duplicating that effort should hardly seem surprising or harsh. The Government, of course, as representative of society as a whole, usually is in the best position to vindicate societal rights and interests. In those instances where, for whatever reasons, the Government fails or declines to take action, the CWA allows citizens acting as private attorneys general to fill the void. That does not mean, however, that HudFish is *ipso facto* entitled to its own, "personalized" remedy in this or any other CWA case. 686 F. Supp. at 1052.

The argument advanced by the Fishermen's Association parallels quite closely that made by the petitioners in this case. The citizens here object to the fact that they were not able to dictate the terms of the settlement which was ultimately reached with the City of Green Forest. Yet, the cases clearly hold that citizen groups have no right to prescribe the terms of a settlement. Even when citizens are permitted to intervene in government enforcement actions, they have no veto power over a settlement negotiated between the government and a defendant. *United States v. Hooker Chemicals & Plastics Corp.*, 540 F. Supp. 1067 (W.D. N.Y. 1982); *United States v. Ketchikan Pulp Co.*, 430 F. Supp. 83 (D. Alaska 1977). Furthermore, civil penalties assessed under the Clean Water Act are not payable to individual citizens, but to the United States Treasury. *Gwaltney, supra*; *Sierra Club v. Electronic Controls Design*, 703 F. Supp. 875 (D. Or. 1989).

Had the EPA filed its action within sixty days after the petitioners gave notice of their intent to sue, the citizens would not have been permitted to file suit to redress alleged Clean Water Act violations, but would have been relegated to the role of intervenors. As has already been pointed out, the petitioners, as intervenors, would have had no right to dictate the terms of any settlement. For whatever reason, perhaps a lack of resources or a prioritizing of violations demanding immediate action, the EPA did not file suit against the City until September of 1987, six months after the citizens filed their suit. Given the fact that citizen groups do not have veto power over settlements negotiated by the government in cases where citizens are permitted to intervene, why should this group of individuals have such power simply because the EPA did not file its suit until six months after the petitioners' action was commenced? The petitioners argue that the Eighth Circuit's decision creates a new *limitation* on citizens' rights to maintain an action under the Clean Water Act. The City submits that the adoption of the citizens' argument would create a new *right* in citizen groups – the right to redress in their own action the very claims resolved by a consent decree negotiated in good faith and at arms length between the EPA and the defendant. There is simply no basis for engrafting such a right into the framework of the Clean Water Act.

The petitioners state in their brief that the decision reached by the Eighth Circuit Court of Appeals on this issue is contrary to the decisions of other courts and that there is no authority for the holding below. The petitioners fail to mention the decision of the United States District Court for the Northern District of Alabama in

United States v. Olin Corporation, 606 F. Supp. 1301 (N.D. Ala. 1985), upon which the Eighth Circuit placed substantial reliance. In that case, the State of Alabama and the United States sought injunctive relief to require Olin Corporation to eliminate DDT from and restore the environment in the vicinity of Redstone Arsenal. As part of the resolution of the case, Olin, the United States and Alabama entered into a consent decree. After making the decree available for public comment, the court entered it on May 31, 1983. The previous January, the plaintiffs had filed a separate action against Olin for injunctive relief requiring Olin to remove DDT from the affected area. Olin filed a motion for summary judgment, arguing that the citizen suit was barred by res judicata.

The trial court granted Olin's summary judgment motion, holding that because the plaintiffs sought the same relief as that requested and attained by the government in the earlier litigation, the plaintiffs' claims were barred by res judicata. In reaching its decision, the court noted that the weight of authority indicates that when a state or the federal government represents all of its citizens in a *parens patriae* suit, a consent decree entered in such a suit is conclusive upon those citizens and is binding upon their rights. Explaining the concept, the court stated that in a proper *parens patriae* action, a government is deemed to represent all of its citizens when the government is a party in a suit involving a matter of sovereign interest, and there is a presumption that the state will adequately represent the position of its citizens. It noted that *parens patriae* lawsuits traditionally involve a government suing to enjoin alleged nuisances caused by air or

water pollution. The *parens patriae* concept was also recognized by the Second Circuit Court of Appeals in *United States v. Hooker Chemicals & Plastics Corp.*, 749 F.2d 968 (2d Cir. 1984). Furthermore, res judicata principles were similarly applied to bar certain citizens' claims in *Student Public Interest Research Group of New Jersey, Inc. v. Georgia-Pacific Corp.*, 615 F. Supp. 1419 (D. N.J. 1985). *See also, Missouri Coalition for the Environment v. Corps of Engineers*, 866 F. 2d 1025 (8th Cir. 1989); *United States v. Ketchikan Pulp Co., supra.*

To support their argument, the petitioners cite *Atlantic States Legal Foundation, Inc. v. Koch Refining Co.*, 681 F. Supp. 609 (D. Minn. 1988) and *Chesapeake Bay Foundation, Inc. v. American Recovery Co., Inc.*, 769 F.2d 207 (4th Cir. 1985). Rather than addressing the issue raised here, those cases dealt only with the question whether a subsequently filed government enforcement action compels the dismissal of a citizen suit. It is one thing to say, as those cases did, that a subsequently filed EPA action does not per se bar a pending citizen suit; it is quite another to extend those holdings, as petitioners would have this Court do, to allow a citizen suit to proceed after a consent decree has been reached between the EPA and the polluter.

Sierra Club v. Coca-Cola Corporation, 673 F. Supp. 1555 (M.D. Fla. 1987), which the petitioners also cite in their brief, is likewise distinguishable. While that case found that a consent decree entered into between the EPA and Coca-Cola did not affect the rights of the citizen group, the citizen suit there had been consolidated with the EPA's action. Here, the citizens' motion to have their case consolidated was denied and the denial was upheld by

the Eighth Circuit Court of Appeals as a proper exercise of the district court's discretion, given the interests of expedition and economy. (App. 16)

The City would also point out to this Court the fact that the citizens who object to the preclusive effect given to the consent decree in this case did have a voice in the settlement of the government's enforcement action. On January 28, 1989, the government lodged its proposed consent decree settling the enforcement action it had prosecuted against the City of Green Forest. Notice of the lodging of the consent decree was published in the Federal Register on February 21, 1989, as required by 28 C.F.R. § 50.7. On March 17, 1989, the citizens filed their objections to the proposed consent decree. The decree was thereafter approved by the district court and filed on March 29, 1989.

In their brief, the petitioners complain that they were denied a hearing in which to present their position and arguments. (Petitioners' Brief, p. 17) Yet, the petitioners never requested an evidentiary hearing. Furthermore, the regulations promulgated with regard to consent judgments in actions such as this one say nothing of a right to a hearing. Rather, 28 C.F.R. § 50.7 provides for an opportunity on the part of persons not parties to the action "to comment" on the proposed judgment prior to its entry by the court. The regulation goes on to state that prior to the entry of the consent judgment, "the Department of Justice will receive and consider, and file with the court, any *written comments, views or allegations* relating to the proposed judgment." (emphasis supplied)

Lastly, the City notes that the scope of the Court of Appeals' ruling in this case is limited. The Eighth Circuit's decision cannot fairly be read to bar every citizen suit from proceeding whenever the EPA subsequently commences and then settles its own enforcement action. Certainly, if the citizen suit seeks to redress different violations of the Clean Water Act or if it seeks a different type of relief, then res judicata or collateral estoppel principles will not apply. Also, the appellate court's ruling will not prevent citizens from maintaining a suit to enforce the terms and provisions of a consent decree. In short, the decision of the Eighth Circuit is limited to its facts. In this case, the citizens admittedly sought to redress in their action the very violations which were covered by the consent decree negotiated between the City and EPA. Under long-standing principles of res judicata and collateral estoppel, the Eighth Circuit properly found that the City should not twice be forced to defend itself against the same allegations of wrongdoing, nor should it twice be subjected to civil penalties or other relief for the same violations of the Clean Water Act.

B.

WHETHER AN APPELLATE COURT CAN DENY ATTORNEY'S FEES AND COSTS INCURRED ON APPEAL BY CITIZEN PLAINTIFFS IN A SUIT BROUGHT PURSUANT TO THE CLEAN WATER ACT.

The petitioners also ask this court to review the propriety of the Eighth Circuit Court of Appeal's denial of their motion for attorney's fees and costs incurred on appeal from the district court judgment. On December 18, 1990, the Eighth Circuit Court of Appeals filed its opinion

in this case, affirming in part, reversing in part and remanding for further proceedings the judgment of the district court. The petitioners filed a motion for attorney's fees, costs and expenses, seeking to recover $85,686.00 in attorney's fees (together with any enhancement which might be determined by the court) and $10,775.94 in costs and expenses incurred in connection with the appeal of this case to the Court of Appeals. The City of Green Forest responded to the motion and on February 25, 1991, the Eighth Circuit entered an order directing that each party bear his or its own costs. (App. 43) Petitioners' subsequent motion for clarification or reconsideration was denied by the Court of Appeals in an order filed March 27, 1991. (App. 82)

The petitioners maintain that they are entitled to attorney's fees pursuant to 33 U.S.C. § 1365(d), which provides:

> The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate.

The petitioners assert that they are the prevailing parties in this litigation and, thus, that the Eighth Circuit Court of Appeals improperly denied their motion for fees and costs. The City of Green Forest submits that the Court of Appeals' order that each party bear its own fees and costs for work performed by its counsel in connection with the appeal was entirely proper and does not merit review by this Court.

The first fact to bear in mind in analyzing this question is that the petitioners' case sought relief not only under the Clean Water Act, but also under a number of other federal and state statutes and under the common law of the State of Arkansas. Two of the four issues raised against the City on petitioners' appeal to the Eighth Circuit arose out of the Clean Water Act; the other two concerned the petitioners' claim against the City for inverse condemnation. The motion for fees and costs submitted by the petitioners included time spent on *all issues* involved in the appeal, not just time spent in connection with Clean Water Act issues. There is no statutory basis for petitioners' recovery of fees and costs in connection with their common law claims against any of the defendants. *Citizens Coordinating Committee on Friendship Heights, Inc. v. Washington Metropolitan Area Transit Authority*, 765 F.2d 1169 (D.C. Cir. 1985).

Secondly, the petitioners did not substantially prevail against the City on their Clean Water Act claims. With regard to the Clean Water Act, the petitioners argued on appeal (1) that the district court erred in denying their motion to intervene in the enforcement action filed by the EPA and/or erred in refusing to consolidate the government's case with the citizens' suit, and (2) that the trial court erred in granting summary judgment in favor of the City on the citizens' Clean Water Act claims. The Eighth Circuit Court of Appeals agreed with the district court that the doctrine of res judicata barred the citizens' Clean Water Act claims against the City and, thus, that the lower court correctly granted summary judgment against the City on that issue. The appeals court also found that the district court properly exercised its discretion in

denying the citizens' motion to consolidate the EPA and citizens' suits. The only issue on which the petitioners can conceivably argue that they prevailed as against the City of Green Forest was on the intervention issue. Yet, even though the Court of Appeals held that the lower court erred in denying the citizens leave to intervene in the EPA action, it found that the denial "for the most part, was harmless error. . . . " (App. 13)

Next, consideration must be given to the language of Rule 39(a) of the Federal Rules of Appellate Procedure, which governs the taxation of costs on appeal. The Rule provides in pertinent part, " . . . if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court." Under Rule 39(a), if a judgment is affirmed, costs are taxed against the appellant. If a judgment is reversed, costs are taxed against the appellee. If, as in this case, a judgment is affirmed in part and reversed in part, the award of costs is entirely discretionary with the court and, in general, equitable considerations mandate that each party bears its own costs. *See, e.g. Matter of Penn Central Transportation Co.*, 630 F.2d 183 (3d Cir. 1980).

The City would also point out that the cases on which the petitioners rely concern the recoverability of fees and costs in connection with work performed at the trial court level. For example, in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the issue was the plaintiffs' entitlement to attorney's fees for work performed at the district court stage of the proceedings. This Court should be aware of the fact that on September 21, 1989, shortly after judgment was entered by the district court, the petitioners filed with that court an application for attorney's fees in

the amount of $348,759.89 (plus any enhancement which might be determined by the court) and costs in the amount of $80,043.92. On petitioners' motion, a consideration of that fee application was stayed pending the outcome of the appeal. Now that the appeal has been concluded, the petitioners most certainly will ask the district court to rule on the pending fee request. Furthermore, as a result of its decision that the trial court erred in denying the citizens leave to intervene in the EPA action, the Eighth Circuit Court of Appeals remanded this case to the district court for the purpose of allowing the citizens to seek attorney's fees for their efforts "in spurring the EPA into finally taking action against the City." (App. 15) Thus, on remand, the petitioners will be permitted to seek fees against the City of Green Forest for at least some of the work performed in connection with this matter.

Finally, this respondent would emphasize that an award of attorney's fees under the Clean Water Act is not mandatory, but is discretionary. *Atlantic States Legal Foundation v. Tyson Foods*, 897 F.2d 1128 (11th Cir. 1990). Under 33 U.S.C. § 1365(d), the court *may* award costs of litigation if the court determines such an award to be *appropriate*. More significantly, Federal Rule of Appellate Procedure 39(a) vests complete discretion as to the taxing of costs in the appellate court, especially in cases which are affirmed or reversed in part. In cases like this one, where the judgment of the district court is affirmed in some respects, reversed in others and remanded for further proceedings, the appellate courts routinely require each party to bear its own costs, including attorney's fees. Given the disposition made by the Eighth Circuit Court

of Appeals in this case, an explanation of its ruling with respect to fees and costs simply was not necessary.

CONCLUSION

A review on writ of certiorari is not a matter of right, but of judicial discretion. Under the Rules of this Court, a petition for writ of certiorari will be granted only when there are special and important reasons therefor. In this case, the petitioners have been unable to demonstrate a conflict among the United States Courts of Appeal on any of the questions presented. They have not established that the decision of the Eighth Circuit Court of Appeals conflicts with any applicable decision of this Court. As the City has explained in its brief, the Court of Appeals correctly applied the statutory provisions of the Clean Water Act, the case law and the appropriate rules of procedure in reaching its decision in this case. For all of the reasons discussed herein, the City of Green Forest respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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No. 90-1768

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In the Supreme Court of the United States

OCTOBER TERM, 1991

LEWIS STEPHEN WORK, ET AL., PETITIONERS

v.

TYSON FOODS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the resolution of an enforcement action brought by the government under Section 309(b) and (d) of the Clean Water Act, 33 U.S.C. 1319(b) and (d), precludes citizens from prosecuting the same violations against the same polluter in a separate citizen suit that had been initiated under Section 505(a)(1) of the Act, 33 U.S.C. 1365(a)(1), prior to commencement of the government's action.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-40) is reported at 921 F.2d 1394. The memorandum opinion of the district court (Pet. App. 44-60) is reported at 720 F. Supp. 132.

JURISDICTION

The judgment of the court of appeals (Pet. App. 41) was entered on December 18, 1990. The order of the court of appeals denying rehearing was entered on February 14, 1991. Pet. App. 81. The petition for a writ of certiorari was filed on May 15, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Clean Water Act creates a comprehensive program "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). As part of that program, Section 301(a) of the Act prohibits all discharges of pollutants into navigable waters except those made in compliance with other sections of the Act, including Section 402, 33 U.S.C. 1342, which establishes the National Pollutant Discharge Elimination System (NPDES). See 33 U.S.C. 1311(a).

Section 402(a) provides that the Environmental Protection Agency (EPA) shall issue NPDES permits authorizing effluent discharges in strict compliance with conditions specified in the permit. 33 U.S.C. 1342(a). Section 309 of the Act authorizes the United States to enforce the terms of a permit through a variety of administrative, civil, and criminal mechanisms. See 33 U.S.C. 1319. In addition, Section 505(a)(1) of the Act permits private citizens to commence a civil action in certain situations against anyone "who is alleged to be in violation of * * * an effluent standard or limitation under this chapter," 33 U.S.C. 1365(a)(1), including the terms of a permit, 33 U.S.C. 1365(f). Section 505 authorizes the district courts to enforce the permit requirements and impose civil penalties, which are payable solely to the United States treasury. A citizen suit may also be brought against the Administrator alleging failure to perform a nondiscretionary duty under the Act. 33 U.S.C. 1365(a)(2).

The commencement of a citizen suit under Section 505 is, however, subject to certain limitations. Citizen suits against alleged violators may not be commenced either (1) prior to 60 days after giving

notice of an alleged violation to the Administrator of EPA, the State, and any alleged violator, 33 U.S.C. 1365(b)(1)(A)[1]; or (2) "if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action * * * to require compliance * * *," 33 U.S.C. 1365(b)(1)(B). When a citizen suit is barred because the United States has commenced and is diligently prosecuting an enforcement action, Section 505(b)(1)(B) further provides that "any citizen may intervene as a matter of right" in any such action in a federal court. 33 U.S.C. 1365(b)(1)(B).

2. In March 1987, after giving the requisite notice, petitioners Lewis Stephen Work and others filed a complaint pursuant to the Clean Water Act's citizen suit provision against Tyson Food, Inc. (Tyson), the City of Green Forest, Arkansas, and the Administrator of EPA, among others, concerning pollution allegedly caused by discharges from the City of Green Forest's wastewater treatment plant. The United States subsequently brought a Clean Water Act enforcement action in September 1987 under Sections 309(b) and (d). The government's suit, like the citizen suit, sought civil penalties and injunctive relief against the City of Green Forest for its discharge of pollutants in violation of (1) Section 301 of the Act, 33 U.S.C. 1311, (2) certain terms and conditions of an NPDES permit issued to the City pursuant to Section 402 of the Act, 33 U.S.C. 1342, and (3) various Administrative Orders issued to the City under Section 309 of the Act, 33 U.S.C. 1319. The government's complaint alleged that the City had dis-

[1] Similarly, no citizen suit may be commenced against the Administrator prior to 60 days after giving notice of such action to the Administrator. 33 U.S.C. 1365(b)(2).

charged pollutants from the City's wastewater treatment works in excess of the limits established by the NPDES permit, and sought an order requiring the City to comply with the Act, the NPDES permit, and the Administrative Orders by adhering to the permit's effluent limitations and submitting required reports.

Nearly two months after the government filed its enforcement action, the citizens filed two motions in the government's action, one seeking intervention in the government's action and the other seeking consolidation of the two cases. The district court rejected the motion to intervene as untimely, and rejected the motion to consolidate on account of the complications that consolidation would cause.[2] The citizens did not file a notice of appeal from the court's denial of the intervention motion within the 60-day period allowed by Fed. R. App. P. 4(a).

The United States and the City subsequently engaged in extensive settlement negotiations in the government's enforcement action, resulting in a proposed consent decree and an opportunity for public comment. In March 1989, the citizens filed a second motion to intervene, based on the lodging of the proposed consent decree. The district court denied the citizens' second intervention motion, explaining that intervention was not appropriate and that the prospective intervenors had an opportunity to, and did, file their objections to the proposed consent decree during the available public comment period. See 28 C.F.R. 50.7. The consent decree was entered by the district court shortly after it denied the citizens' second motion to

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[2] The district court also denied another motion, filed by the citizens in their citizen suit, to consolidate the citizen suit with the government's enforcement action.

intervene. Pet. App. 78. The decree (1) required the City to pay a penalty of $15,000 for past violations and to maintain compliance with the NPDES permit and the Act, effective immediately, and (2) provided for stipulated penalties in the event of future violations.

Following the entry of the consent decree in the government's enforcement action, the district court dismissed the citizens' Clean Water Act claims against the City. The court explained that "[b]ecause issues raised against the City under the Clean Water Act have been resolved, plaintiffs are barred from raising the same issues here." Pet. App. 79. The citizens subsequently appealed from the district court's denials of their two intervention motions. That appeal was held in abeyance pending completion of the citizen suit at the citizens' request.

After a trial, a jury found in favor of the citizens as against Tyson Foods, and awarded $244,412 in damages on state law claims. The jury found in favor of the City on the citizens' claims against it that had not been dismissed. The district court entered judgment on the verdict and assessed Tyson $43,000 in civil penalties for the company's Clean Water Act violations. Tyson and the citizens both appealed, and their appeals were consolidated with the citizens' appeals from the denial of their intervention motion at the citizens' request.

3. The court of appeals affirmed the district court's dismissal of the citizens' Clean Water Act claims against the City. Pet. App. 16-21.[3] The court noted

[3] The court also determined that it lacked jurisdiction to consider the citizens' appeal from the denial of their first motion to intervene in the government's enforcement action because that appeal was untimely. Pet. App. 11-12. The court

that the citizens "concede[] that the CWA claims made in the citizens' suit were the same as those made by the EPA." *Id.* at 17. It stated that "there may be some cases in which it would be appropriate to let a citizens' action go forward in the wake of a subsequently-filed government enforcement action," *id.* at 19-20, but found that "this is not such a case" due to the entry of the consent decree, *id.* at 20:

> In view of the preeminent role that must be afforded the EPA in enforcing CWA act violations—a role contemplated by the legislative history and recognized by the Supreme Court in *Gwaltney* [*of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 60 (1987)]—we hold that it was proper for the district court to dismiss [petitioners'] CWA claims against Green Forest after the latter had entered into a consent decree with the EPA. The EPA is charged with enforcing the CWA on behalf of all citizens. Since citizens suing under the CWA are cast in the role of private attorneys general, as a practical matter there was little left to be done after the EPA stepped in and negotiated a consent decree.

Ibid.

4. Following the denial by the court of appeals of requests for reconsideration, Pet. App. 81, the parties filed cross petitions for writs of certiorari. Because the issues identified in the two petitions all arose in the citizen suit, the United States waived its right to respond to those petitions. The Court subsequently

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determined that the district court had erred by denying the citizens' second motion to intervene, *id.* at 13, but determined that this error was "largely harmless," *id.* at 14; it remanded for the purpose of allowing the citizens an opportunity to recover attorneys' fees, *id.* at 15.

requested that the United States respond to question 1 in the citizens' petition, which concerns the propriety of the court of appeals' affirmance of the district court's dismissal of the citizens' Clean Water Act claims against the City.[4]

ARGUMENT

The decision of the court of appeals is correct and is not in conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. Petitioners contend that the court of appeals "erroneously concluded that the entry of a consent decree in an enforcement action commenced subsequent to the filing of a citizens' suit pursuant to Section 505(a) of the CWA * * * precluded the prosecution of a previously filed citizen suit." Pet. 12. But there is no good reason why petitioners should have been permitted to pursue the very same claims resolved by the consent decree simply because the government's enforcement action was commenced subsequent to the filing of their suit. Indeed, as petitioners admit, "Congress intended for the EPA to have the primary role in enforcing the Act." Pet. 13, citing *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987); see also *Hallstrom* v. *Tillamook County*, 110 S. Ct. 304, 310 (1989) (EPA's enforcement efforts may obviate the need for citizen suits). In *Gwaltney*, the Court held that "the

[4] Petitioners also complain that "the appellate court erred in holding the district court's failure to allow intervention harmless." Pet. 17 n.4. However, they add that "this error is overshadowed by the greater error herein addressed," *ibid.*, and they did not include any challenge to the court of appeals' rulings on intervention in their list of questions presented to the Court.

citizen suit is meant to supplement rather than to supplant governmental action." 484 U.S. at 60. Accordingly, where EPA has entered into a consent decree, citizens should not be permitted to pursue an action based on the claims resolved by the consent decree.

Contrary to petitioners' suggestions, Pet. 12-15, nothing in the Act supports their position. Neither the requirements of Section 505(b), which governs commencement of a citizen suit, nor the provisions of Section 505(c), which authorizes EPA to intervene in citizen suits and to review and comment on proposed consent decrees in citizens suits, show that Congress intended EPA's role as enforcer to diminish based simply upon the timing of commencement of an enforcement action by the government. Indeed, far from showing a congressional intent that EPA yields its role as primary enforcer of the Act if it waits to commence an enforcement action until after the filing of a citizen suit, the provisions petitioners cite reveal Congress's intent that EPA play a central role in enforcement actions even where the agency chooses not to file its own enforcement action.

Contrary to petitioners' assertion (Pet. 12), no other court of appeals has ruled differently than the court of appeals below. Petitioners wrongly cite the decision of the Fourth Circuit in *Chesapeake Bay Foundation, Inc.* v. *American Recovery Co.*, 769 F.2d 207 (4th Cir. 1985), to support their theory that they should have been permitted to pursue their claims against the City despite the fact that those very claims had been settled in the government's enforcement action. In fact, that court made no such ruling in that case, having found that the appeal was moot due to the negotiation of a consent decree. *Id.* at 209.

In addition, petitioners incorrectly state that "there is no authority under any case that has dealt with this

issue for the holding below." Pet. 17. To the contrary, only one other court of appeals has faced similar circumstances, and that court's decision is fully consistent with the decision of the court of appeals in this case. In *Atlantic States Legal Foundation, Inc.* v. *Eastman Kodak Co.*, 933 F.2d 124 (1991), the Second Circuit upheld the propriety of dismissing a citizen suit based on the entry of a consent decree in a subsequently commenced government enforcement action. In *Atlantic States*, the State of New York commenced an enforcement action under the Clean Water Act after the Atlantic States Legal Foundation had initiated a citizen suit, and the district court dismissed the citizen suit based on entry of a consent decree between the State and the polluter in the State's enforcement action. On appeal, the Second Circuit held that "[i]f the state enforcement proceeding has caused the violations alleged in the citizen suit to cease without any likelihood of recurrence —has eliminated the basis for the citizen suit—we believe that the citizen action must be dismissed." 933 F.2d at 127. The court explained:

> The purpose of the citizen suit is to stop violations of the Clean Water Act that are not challenged by appropriate state and federal authorities. However, we do not believe the Clean Water Act can or should be read to discourage a governmental enforcement action once a citizen suit has been commenced nor to prevent state or local authorities from achieving a settlement as to conduct that is the subject of a citizen complaint. To hold otherwise would likely lead to underenforcement of the Clean Water Act.

Ibid. That same reasoning applies here.

Significantly, this is not a case where claims made by the citizens in their suit have been left unresolved

by the combined entry of a consent decree in the government's enforcement action and the dismissal of their Clean Water Act claims in their citizen suit. The district court determined that the consent decree had "resolved" the "issues raised against the City under the Clean Water Act," Pet. App. 79, and petitioners conceded in the court of appeals that their Clean Water Act claims against the City "were the same as those made by the EPA," *id.* at 17. In those circumstances, the court of appeals correctly affirmed the district court's dismissal of the citizens' Clean Water Act claims against the City. Furthermore, petitioners commented on the proposed decree, and the district court took their comments into account in reaching its decision. Pet. App. 14. Allowing the citizens now to pursue the same claims resolved by the consent decree, where the relief available to the citizens—injunctive relief and penalties—is identical to that available to the government, would undermine the district court's judgment that the consent decree provides an adequate remedy for the violations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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